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No. 6529

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHIN WING,

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Appearance of Respondent and Notice of Filing Excerpts of Testimony from the Original Immigration Record 20

Assignment of Errors 45

Certificate of Clerk U. S. District Court to Transcript of Record 51

Citation on Appeal 52

EXHIBITS:

Petitioner's Exhibit "A"—Findings and Decision of Board of Special Inquiry. 32

Memorandum, Respondent's, of Excerpts of Testimony from the Original Immigration Record 20

Minutes of Court—March 9, 1931—Order Submitting Application on Briefs 39

Minutes of Court—June 8, 1931—Order Denying Motion for Writ of Habeas Corpus .. 43

Names and Addresses of Attorneys of Record. 1

Notice of Appeal 43

Notice of Motion for Rehearing 41

Order Allowing Appeal 48

Index.

Page

Order Denying Motion for Writ of Habeas Corpus 43
Order Denying Petition for Writ of Habeas Corpus, etc. 40
Order to Show Cause 18
Order Transmitting Original Exhibits 49
Order Submitting Application on Briefs 39
Petition for Appeal 44
Petition for Writ of Habeas Corpus 1
Praecipe for Transcript of Record 50
Respondent's Memorandum of Excerpts of Testimony from the Original Immigration Record 20

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Petitioner and Appellant:
STEPHEN M. WHITE, Esq., 576 Sacramento St., San Francisco, California.

For Respondent and Appellee:
UNITED STATES ATTORNEY, San Francisco, Calif.

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 20,464–S.

In the Matter of CHIN WING, on Habeas Corpus. No. 29394/3–23; ex SS. "PRESIDENT CLEVELAND," July 23, 1930.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable, the Southern Division of the United States District Court, for the Northern District of California:

The petition of Louie Yee Hong respectfully shows:

I.

That Chin Sung is a Chinese person who was born in the United States and subject to the jurisdiction thereof.

II.

That Chin Sung has resided continuously in the United States since his birth, save for the following trips to China: departed in 1885, and returned in 1898; departed in 1905, and returned in 1906; departed in January, 1911, and returned in April, 1912; departed in August, 1920, and returned in September, 1922; departed in June, 1928, and returned in July, 1930; that incident to his departure and return from each of said trips, he was examined by the United States Immigration authorities as to citizenship and, as a result, it was found and conceded by the said immigration authorities, on each of the occasions, aforesaid, that he was a native-born citizen of the United States by virtue of having proved, on each of said occasions, that he was born in the United States and subject to the jurisdiction thereof. [1*]

III.

That, while in China between the years 1885 and 1898, Chin Sung married a Chinese by the name of Lok Shee; that, on November 5, 1911, in China, there was born to Chin Sung and to his wife, Lok Shee, a son by the name of Chin Wing.

IV.

That on the 23d day of July, 1930, the said Chin Wing arrived in the Port of San Francisco, California, and, thereupon, applied to the United States immigration authorities for admission into the United States; that his application for admission

*Page-number appearing at the foot of page of original certified Transcript of Record.

was based upon the ground that he is a citizen of the United States, in that he is the foreign-born son of a native-born citizen of the United States (Section 1993 of Revised Statutes).

V.

That the application for admission of the said Chin Wing was heard by a Board of Special Inquiry, which was convened by the Commissioner of Immigration for said port and, as a result, the said Board of Special Inquiry found that Chin Wing was not a citizen of the United State for the reason that he was not the son of his alleged father, Chin Sung, but that the said Board of Special Inquiry found and conceded that the alleged father was a native-born citizen of the United States; that an appeal was taken from the decision of the Board of Special Inquiry to the Secretary of Labor with the result that the Secretary of Labor affirmed the excluding decision of the Board of Special Inquiry and *order* the said Chin Wing deported to China.

VI.

That the said Chin Wing is now in the custody of John D. Nagle, as Commissioner of Immigration for the Port of San Francisco, at Angel Island, County of Marin, State and Northern District of California, Southern Division thereof, and the said John D. Nagle, [2] acting under the orders of the Secretary of Labor, has given notice of his intention to deport the said Chin Wing to China on the SS. "President Pierce," which sails from the

Port of San Francisco, California, on the 19th day of December, 1930.

VII.

That the Board of Special Inquiry and the Secretary of Labor, in excluding him from admission into the United States and in holding him in custody so that his deportation may be effected, are acting in excess of the authority and power committed to them by the statutes in such cases made and provided for and are unlawfully confining, imprisoning and restraining the said Chin Wing, hereinafter referred to as the "detained" in each of the following particulars, to wit:

1. That, at the hearing of the detained before the Board of Special Inquiry, there were produced, as witnesses in his behalf, his alleged father, Chin Sung, and his alleged prior landed brother, Chin Tong, and that these witnesses testified in agreement with each each other and with the detained, as to the following matters and things: that the detained is named Chin Wing, that he was born on November 5, 1911, at Lan On Village, Sun Ning District, China; that the father of the detained is named Chin Sung, that his marriage name is Chin Ngee Moon, that he is 49 years old and that he resides at Pocatello, Idaho; that the father of the detained was married twice, that his wife, who is the mother of the detained, was named Lok Shee, that she was a native of Wong Poon Lau Village, Sun Ning District, China, that she died at Lan On Village on December 1, 1919, that she is buried in Hai Ngai Hill, that her grave is not marked by

any stone or monument; that Wong Poon Lau Village is located about 4 or 5 lis (about 1 and one-half mile) west of Lan On Village; that Hai Ngai Hill is located a little over 1 li (about ⅓ of mile) east of Lan On Village; that the detained's father's second wife is named [3] Lok Shee, that he married Lok Shee in November, 1920, that she has natural feet, that she is 29 years old and she is living at Lan On Village; that the detained's father had 3 sons by his first wife and that these sons are: Chin Tong, 32 years old, who is residing at Denver, Colorado, who first came to the United States in 1912 and who has since made one trip to China; Chin Fong, 25 years old, who first came to the United States about 7 or 8 years ago, who thereafter returned to China and who is now residing at Canton City, where he is attending school; Chin Wing, 20 years old, who is the detained; that the detained's father had 2 sons by his second wife, that these sons are: Chin Gay, about 10 years old, and Chin Yee, about 2 years old, both of whom are living with their mother at Lan On Village, China; that the detained's oldest brother Chin Tong was married at Lan On Village, China, in 1918, to Lee Shee, who is 27 or 28 years old, who has natural feet and who is living at Lan On Village; that one son, Chin Wen, about 12 years old, has been born to Chin Tong and his wife, that this son is living with his mother at Lan On Village; that Chin Tong's marriage name is Chin Eng How; that the detained's second brother, Chin Fong, was married at Lan On Village, China,

in May, 1926, to Toy Shee, 24 or 25 years old, who has natural feet and who is living at Canton City with her husband; that 2 children, Chin Poy Chong, about 3 years old, and Chin Poy Foo, about 2 years old, have been born to Chin Fong and his wife, that these children are living with their parents at Canton City; that Chin Fong's marriage name is Chin Min Sen; that the detained was married at Lan On Village, Sun Ning District, China, on January 16, 1929, to Lee Shee, who is about 19 years old, who has natural feet and who is living at Lan On Village; that no children have been born to the detained and his wife; that the detained has no paternal uncles or aunts; that the paternal grandfather of the detained was named Chin Tan Yet, that he died before the detained was born; that the [4] paternal grandmother of the detained was named Louie Shee, that she had bound feet, that she died at the age of 70 years at Lan On Village, in July, 1928; that the paternal grandparents of the detained are buried under one mound at Hai Ngai Hill; that there is a stone, which is about 9 inches high and about 8 inches wide, upon which there appears the inscription "Chin Tan Yet Foon Moo," marking their graves, that these graves are about 6 or 7 jungs (60 or 70 feet) distant from the grave of the detained's mother; that the detained has two maternal uncles and one maternal aunt; that the uncles are: Lok Doon, who is in England and Lok Koon, who is in Shanghai; that his maternal aunt is married to a Louie family man; that the detained has been attending

school since 1926 in Sun Ning City, which is located about 2 pos (about 6 miles) south of Lan On Village, that he quit attending school there at the end of last year (1929), that he never attended school at Lan On Village, except for a few days about five years ago; that his school at Sun Ning City had two vacations yearly, one in the summertime for about 3 weeks and one at New Year's time for about 5 weeks, that the detained always spent his vacations at home; that when the detained's father arrived at home in 1928 on his last visit to China, the detained was at school in Sun Ning City, that the detained came home about 4 or 5 days after the arrival of his father and that he returned to school after remaining at home for about one day; that the detained's second brother was attending school at Canton City when his father arrived home on his last visit, that his brother, Chin Fong, in company with his family came home about 6 or 7 days after the father's arrival, that Chin Fong and his family remained at home for 2 or 3 days and then returned to Canton City; that during the detained's father's last visit to China between 1928 and 1930, the detained, in company with his father, visited the graves of the detained's paternal grandparents and of the detained's mother; that the visits [5] were made in the 3d month of 1929 and in the 3d month of 1930; that, on the occasion of the last visit to the graves, the graves of the paternal grandparents were visited first and that a hoe was taken along to clean the graves; that during the detained's father's last visit to China, the detained's

second brother, Chin Fong, in company with his family, made two visits at home, that the first visit was made during the New Year's time of 1928 and the second visit was made during the 12th month of last year (1929), that, on each visit, Chin Fong and his family remained for about one month; that the detained's oldest brothers, Chin Tong and Chin Fong, had attended school in the Oon Nook School in Lan On Village, that this school is located in the Ngee Din Ancestral Hall, which stands by itself at the head of the village; that Lan On Village, where the detained and his brothers were born and have lived, contains about 60 houses, which are arranged in 10 rows, that there are two ancestral halls in the village, one at the head and one at the tail, that there are also three watch-towers in the village; that the detained's house is the 4th in the 3d row counting from the tail or west of the village, that this house was erected in 1923, that it is one story high, that it is built of adobe, that it has tile floors in all rooms, that it has five rooms, which are two bedrooms, two kitchens and a parlor, that it has an open court, which is paved with stone, that it has two outside doors, the large door of which faces east and the small door of which faces west, that in each bedroom there is a window protected by iron bars and wooden doors, that there is a double skylight in each bedroom and a single skylight in each kitchen, that the skylights are covered by glass, that there is a loft in each bedroom and a loft in the parlor, that there is an ancestral tablet kept on the loft in the parlor, that the parlor is

furnished with a table and 5 or 6 stools, that there are 4 chairs in the house, that there is a bedroom partitioned off the parlor, that there [6] are no photographs hanging on the walls of the house, that there is no clock of any kind in the house; that the detained's family owns a black-tailed dog, that this dog has been owned for about 4 years, that the family had this dog prior to the detained's father's last visit to China; that the house, in which the detained's family formerly lived was located on the same lot that the present house is located, that the old house was torn down in 1923, that it was a one-story adobe house with dirt floors throughout; that the row, in which the detained's house is located, contains 6 houses, that Chin Sim occupies the 6th or last house in the row, that the widow of Chin Bing Lim lives in the 3d house of the row, that she has one daughter, who is married, that Chin Kee Shuck lives in the 5th house, that he is at present in the United States, that he has a wife and two sons, that the sons are: Chin Chung You, about 20 years old, and Chin Ock Sim, about 13 or 14 years old, that Chin Go lives in the house opposite the large door of the detained's house, that he is now in England, that he has a wife, one son and one daughter, that the son is Chin Seung Kew, about 20 years old, that the daughter is Chin Juck, about 20-odd years old and married, that Chin Suey Tong lives in the house in front of the detained's house; that Chin Suey Tong has one son, who is Chin Yook Hong; that the house opposite the small door of the detained's house is empty; that during the de-

tained's father's last visit to China, the detained's father, the detained's stepmother and the detained's half-brother, Chin Gay and half-sister, Chin Yee, occupied the parlor of the house, that Chin Tong's, the detained's oldest brother, family occupied the bedroom on the large door or east side of the house, that the detained and his wife occupied the bedroom on the small door side, that, prior to his marriage, the detained's second brother, Chin Fong, and the latter's family occupied the small door bedroom, that, prior to her death, the detained's paternal grandmother occupied the parlor; that [7] the detained's father owns a watch-tower in the home village, that this tower is made of concrete, that it is three stories high, that there are two small rooms on each floor, that this tower was built in 1926 for protection against bandits; that when the detained's second brother, Chin Fong, and the latter's family visited the home village in 1928 and 1929, they occupied rooms in the watch-tower; that the detained's family usually did its marketing at Ai Gong Market, that the Gong Ah Store in this market was usually patronized, that this store was operated by Ing Heung; that the family sometimes did its marketing at the Chin Bin Market; that Ock Ching Market is also located near the detained's home village; that the village people held a pork distribution every year at New Year's time in one of the ancestral halls; that the village has a fish pond in front, that there is a small stream of water in front of the village about one li distant, that there is no wall around the village; that Chin Wee

Foo, Ong Kay Jew and Chin Sing Him, were the names of persons who taught school in the home village; that the detained was accompanied to the United States by his father, that they left the home village together to proceed to the United States at about 7 A. M., that they walked from the village to Chin Bin Railway Station, which is located about 2 lis (about ⅔ of mile) west of the village, that they took a train at Chin Bin Railway Station for Bok Gai Market, where they changed to a steamer for Hongkong, that they arrived at Hongkong at about 11 P. M. of the same day, that they went ashore immediately and took headquarters at Loon Chung Hai Company on Shung Woon Street, that Yim Hip was the manager at that place, that they remained in Hongkong for 17 or 18 days before boarding a steamer for the United States.

2. That, at the hearing before the Board of Special Inquiry, there were introduced in evidence all the immigration records pertaining to Chin Sung, the father of the detained, and containing [8] all of the statements made by the said Chin Sung to the immigration authorities on the occasion of his every appearance before them; that the said records disclose that when the said Chin Sung returned to the United States in April, 1912, from a temporary visit to China, he made a sworn statement to the immigration authorities that he had a son by the name of Chin Wing, who was born on November 5, 1911, which name and birthdate corresponds with the name and birthdate of the detained, and that, thereafter, as disclosed by the said

records, the said Chin Sung claimed to have a son, who bears the same name as the detained, and who was born on the same date as claimed for the birth-date of the detained, on the following occasions: in April, 1912, incident to the application for admission to the United States of his oldest son, Chin Tong; in August, 1920, incident to his departure from the United States for a temporary visit to China; in September, 1922, incident to his return to the United States; in September, 1922, incident to the application for admission to the United States of his second son, Chin Fong; in June, 1928, incident to his departure from the United States for a temporary visit to China; in July, 1930, incident to his return to the United States.

3. That, at the said hearing before the Board of Special Inquiry, there were introduced in evidence all the immigration records pertaining to Chin Tong, the oldest prior landed alleged brother of the detained; that these records disclose that the said Chin Tong, incident to his application for admission to the United States in April, 1912, made a sworn statement to the immigration authorities that he had a brother who bears the same name as the detained and whose age corresponds with that of the detained; that the said records further disclose that the said Chin Tong, incident to the application for admission to the United States in September, 1922, of his brother, Chin Fong, again made a sworn statement to the immigration authorities that he had a brother, who bears the same

name as the detained and whose age corresponds with that of the detained. [9]

4. That, at the hearing before the Board of Special Inquiry, there were introduced in evidence all the immigration records relating to Chin Fong, the second prior landed alleged brother of the detained; that the said records disclose that the said Chin Fong, incident to his application for admission to the United States in September, 1922, made a sworn statement to the immigration authorities that he had a brother, who bears the same name as the detained and whose age corresponds with that of the detained.

5. That, at the said hearing before the Board of Special Inquiry, the detained personally identified Chin Sung, his alleged father, as his father and the said Chin Sung personally identified the detained as his son; that, at the said hearing, there were exhibited to the detained photographs from the immigration records of Chin Tong and Chin Fong, the prior landed alleged brothers of the detained, and the detained identified the said photographs as those of his brothers, Chin Tong and Chin Fong; that there was exhibited to the said Chin Tong, the oldest prior landed alleged brother of the detained, a photograph of the detained and the said Chin Tong identified the said photograph as that of his brother, the detained.

6. That the examining inspector, who questioned Chin Tong, the oldest prior landed brother of the detained, made the following report upon the testimony of the said Chin Tong:

"Office of District Director
Denver, Colorado.

No. 6516/6–B. September 17, 1930.

U. S. Commissioner of Immigration,
San Francisco, Calif.

Reference being had to your file No. 29394/3–23, and your letter of the 11th. instant, with which you transmitted files in the case of the application of Chin Wing, for admission as the son of Chin Sung, a native, with the request that statements be taken from the alleged brother of Chin Wing, namely, Chin Tong, at Denver, Colo., be advised that such statement was taken and three copies of same are transmitted herewith, [10] together with the files transmitted with the case, Nos. 29394/2–26, 12017/29106, 16338/6–9 and Seattle files R. S. 15551 and R. S. 1280.

The witness making the inclosed statement speaks English, seems to know considerable about the applicant, or else has been coached very thoroughly as to affairs in China in the Lan On Village, and was not at all embarrassed by the questions, nor did he seem at all non-plussed by any of the questions asked.

W. R. MANIFIELD,
District Director of Immigration, Denver Colorado."

That your petitioner alleges that the fact that the detained's alleged father, Chin Sung, was in China at a time to render possible his paternity to the detained, having been in China between the years 1911 and 1912 and the detained having been born

on November 5, 1911, the fact that the detained, his alleged father and his prior alleged brother, Chin Tong, have testified in agreement upon all matters of family relations, family history, the principal and minor events of family life, the description of the village in China where the detained was born and has lived, the conditions in the village, the description of the family home and as to a countless number of other matters and things, both material and immaterial, the fact that the alleged father and the prior landed alleged brothers, Chin Tong and Chin Fong, of the detained have consistently claimed a boy of the name and age of the detained as a member of their family, the fact that there was mutual identification between the detained and his alleged father, the fact that the detained identified his prior landed alleged brothers from photographs of these brothers contained in the immigration records, the fact that the oldest prior landed alleged brother of the detained identified the detained from a photograph exhibited to him, established to a reasonable certainty that the relationship of father and son exists between the alleged father and the detained; that the said immigration authorities, in [11] denying the existence of the said relationship, have arbitrarily rejected the aforesaid evidence establishing the existence of the said relationship and have thereby acted manifestly unfair and have, as a result, denied the detained the full and fair hearing to which he was and is entitled.

7. That the said immigration authorities, in denying the existence of the relationship of father

and son between the alleged father and the detained, have urged certain testimonial discrepancies which are contained in the findings of the Board of Special Inquiry, which findings are filed herewith under Exhibit "A," and which findings are hereby expressly referred to and made a part of this petition with the same force and effect as if set forth in full herein; that your petitioner alleges that the alleged testimonial discrepancies, as urged by the Board of Special Inquiry, are not unreasonable, but that the same are the probable result of honest mistake, rather than deliberate error or falsehood on the part of any of the witnesses; that all the testimony, upon which all of the said testimonial discrepancies are predicated, is narrated in the brief of counsel which brief was filed in behalf of the detained when the case of the detained was pending before the Secretary of Labor upon appeal from the adverse decision of the Board of Special Inquiry; that the said brief shows that all of the said testimonial discrepancies are subject to reasonable explanations; that the said brief is filed herewith under Exhibit "B" and is hereby expressly referred to and made a part hereof with the same force and effect as if set forth in full herein; that the said immigration authorities, in denying the existence of the claimed relationship upon so-called testimonial discrepancies, which are not unreasonable or which do not show that the witnesses have given false testimony, but which discrepancies are subject to a reasonable explanation, as disclosed by the brief filed here-

with, have acted manifestly unfair and have denied the detained the full and fair hearing to which he was and is entitled. [12]

VIII.

That the detained is in detention as aforesaid and for said reason is unable to verify this petition; that Chin Sung, the father of the detained, is at Pocatello, Idaho, where he resides, and for said reason is unable to verify this petition upon his own behalf or in behalf of the detained; that Chin Tong, the prior landed alleged brother of the detained, is at Denver, Colorado, and for said reason is unable to verify this petition; that all other relatives of the detained are in China; that your petitioner is the next friend of the father of the detained and of the detained available to verify this petition, by reason of which your petitioner verifies this petition, but for and as the act of the detained and of his father.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner commanding and directing him to hold the body of the said detained within the jurisdiction of this Court, and to present the body of the said detained before this Court at a time and place to be specified in said order, together with the time and cause of his detention, so that the same may be inquired into to the end that the said detained may be restored to his liberty and go hence without day.

Dated at San Francisco, California, December 19, 1930.

STEPHEN M. WHITE,
Attorney for Petitioner. [13]

State of California,
City and County of San Francisco,—ss.

Louie Yee Hong, being first duly sworn, deposes and states as follows:

That your affiant is the petitioner in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief; and as to those matters he believes it to be true.

LOUIE YEE HONG.

Subscribed and sworn to before me this 18th day of December, 1930.

[Seal] STEPHEN M. WHITE,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Dec. 19, 1930. [14]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Good cause appearing therefor, and upon reading the verified petition on file herein,—

IT IS HEREBY ORDERED that John D. Nagle, Commissioner of Immigration for the Port

of San Francisco, appear before this Court on the —— day of January, 1931, at the hour of 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Commissioner, and a copy of the petition and said order be served upon the United States Attorney for this District, his representative herein.

AND IT IS FURTHER ORDERED that the said John D. Nagle, Commissioner of Immigration, as aforesaid, or whoever, acting under the orders of the said Commissioner or the Secretary of Labor, shall have the custody of the said Chin Wing, or the Master of any steamer upon which he may have been placed for deportation by the said Commissioner, are hereby ordered and directed to retain the said Chin Wing, within the custody of the said Commissioner of Immigration, and within the jurisdiction of this Court until its further order herein.

Dated at San Francisco, California, December 19th, 1930.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed December 19, 1930. [15]

[Title of Court and Cause.]

APPEARANCE OF RESPONDENT AND NOTICE OF FILING EXCERPTS OF TESTIMONY FROM THE ORIGINAL IMMIGRATION RECORD.

To the Petitioner in the Above-entitled Matter, and to Stephen M. White, His Attorney:

PLEASE TAKE NOTICE that the respondent hereby appears in the above-entitled matter and will, upon the hearing on the order to show cause, rely upon certain excerpts of testimony from the original immigration record additional to the portions of such records which are set out in the petition for writ of habeas corpus herein, a copy of such additional excerpts being annexed hereto. Please examine same prior to the hearing on the order to show cause.

Dated: March 9, 1931.

GEO. J. HATFIELD,
United States Attorney,
(Attorney for Respondent). [16]

[Title of Court and Cause.]

RESPONDENT'S MEMORANDUM OF EXCERPTS OF TESTIMONY FROM THE ORIGINAL IMMIGRATION RECORD.

The witnesses herein are:

CHIN WING, the applicant, claims birth on November 5, 1911, and was never in the United States.

CHIN SUNG, alleged father of the applicant, age 49 years, born in the United States but was in China from 1885 to 1889, from 1905 to 1906, from 1910 to 1912, from August, 1920, to September, 1922, and from June, 1928, to July, 1930.

CHIN TONG alleged brother of the applicant, born in 1899, first came to the United States in April, 1912, and was back in China from December, 1917, to July, 1919.

The applicant has been denied admission to the United States for failure to establish satisfactorily that he is the son of Chin Sung.

There is set forth below, from the original immigration record, some of the conflicting testimony.

I.

CHIN SUNG testified, in connection with the present application, on September 4, 1930, as follows:

> Q. "Has this applicant resided continuously in LAN ON VILLAGE from the time of his birth until you brought him to this country?
>
> A. Yes, except during the last few years when he has been attending school at SUN NING CITY. He quit school at the end of last year."
>
> (Immig. Record 55735/639, p. 16.) [17]
>
> Q. "When you arrived home in China on your last trip, where did you first see this applicant?
>
> A. About three days after I arrived home. He was attending school at SUN NING CITY.
>
> Q. How did he happen to come home about three days after your arrival?

A. He was told to come home, by a letter written by me.

Q. How far and in what direction is SUN NING CITY from your village?

A. About 3 pos southwest.

Q. To what address did you send that letter notifying the applicant to come home?

A. I sent it to him in care of the WONG SHEE SCHOOL.

Q. Was he living at that school?

A. I do not know, but he was attending that school at that time.

Q. Do you know what year he first started to attend that school in SUN NING CITY?

A. I do not remember.

Q. Did he ever attend any other school?

A. Yes, the OON MOOK SCHOOL, not far from the head of my village.

Q. Has he ever attended any other school besides these two you have mentioned?

A. Not to my knowledge.

* * * * * * * *

Q. At what age did this applicant first start school?

A. He started at either 7 or 8 years of age. I was in this country when he started to go to school."

(Id., pp. 17 and 18.)

Q. "Did this applicant ever attend school with you son CHIN FANG?

A. I do not think so.

Q. Was there more than one school in the home village? A. No, just one.

Q. Is that school held in the ancestral hall?

A. Yes, in the NGEE DIN Ancestral Hall. The school is called OON MOOK.

Q. You brought CHIN FANG to this country the first time, did you not? A. Yes.

Q. Was he then attending school at the NGEE DIN Ancestral Hall? A. Yes.

Q. Was this applicant CHIN WING then attending school?

A. Yes, at the same school, OON MOOK. I have forgotten whether my second son every attended school with the applicant or not, because my second son CHIN FANG also attended school in GONG MOON CITY before he first came to the U. S.

* * * * * * * *

Q. You brought him to this country in CR.–11 (1922). Was that the year you have in mind?

A. He did not go to school in CR.–11 (1922). It was in CR.–10 (1921)."

(Id., p. 20.)

and on September 5, 1930, as follows: [18]

Q. "How do you know this applicant first started to school when he was 7 or 8 years of age?

A. I do not know for certain. I merely guessed at that.

Q. During your visits that you made to

China was this applicant actually attending school in the home village?

A. Yes, except on my last trip, when he was attending school at SUN NING CITY.

Q. You were in China on your second last trip from 1920 to 1922. During that entire period of time did the applicant attend school in the home village? A. Yes.

Q. At that time was there only one school held in your village? A. Yes, just one.

Q. And that was the OON MOOK SCHOOL?

A. Yes.

Q. Did the applicant have a summer vacation in that school? A. Yes."

(Id., p. 33.)

CHIN TONG testified on October 11, 1922, in connection with the application of an alleged brother for admission, as follows:

Q. "When did you come to the United States the first time?

A. April 24, 1912, ex. S.S. "Persia."

Q. How many times did you go to China?

A. One trip—departed Dec. 22, 1917, and returned July 16, 1919.

* * * * * * * *

Q. What was your brother, Chin Wing, doing when you were last in China?

A. Going to school."

(Immig. Record 12017/29106, p. 12.)

CHIN WING testified in connection with the present application, as follows:

Q. "How long did you attend school in SUN NING CITY? A. 3 or 4 years.

Q. When did you stop attending school in SUN NING CITY?

A. At the end of last year."

(Immig. Record 55735/639, p. 24.)

and on September 5, 1930, as follows:

Q. "When did you first start to attend school at SUN NING CITY?

A. In CR.–15 (1926).

Q. Did you ever attend any other school?

A. No.

Q. Is there a school in your home village?

A. Yes.

Q. What is the name and location of it?

A. The OON MOOK SCHOOL; it stands alone at the head of the village. [19]

Q. When did you stop attending school in SUN NING CITY?

A. At the end of last year.

Q. Then did you attend that school for four years? A. Yes.

Q. Have you only been attending school four years altogether? A. Yes.

Q. Then you first started to attend school when you were about 16 years old?

A. Yes.

Q. Why didn't you attend school in your home village?

A. Because I wanted to attend school in SUN NING CITY.

Q. Did you ever at any time attend school at the OON MOOK SCHOOL in your village?

A. No.

Q. Who told you to go to school in SUN NING CITY?

A. No one, I wanted to go there myself.

Q. Did other boys of the LAN ON VILLAGE attend the WONG SHEE SCHOOL in SUN NING CITY? A. No.

Q. At what age do the other boys in your village start school at the village school?

A. I don't know, but I believe they start school between 11 and 12 years of age."

(Id., p. 27.)

Q. "Before CHIN FANG came to this country about 8 years ago, what was he doing in China?

A. He was a student in the home village, at OON MOOK SCHOOL.

Q. At what age did he start school?

A. I do not remember.

Q. Is the OON MOOK SCHOOL located in one of these ancestral halls?

A. Yes, in the NGEE DIN Ancestral Hall, located at the head of the village.

Q. Did CHIN FANG ever attend any other school than the one in your home village?

A. No.

Q. Did any of you three boys ever attend school in GONG MOON CITY? A. No.

Q. Your father states that you attended another school prior to the time that you attended school in SUN NING CITY. Why do you disagree with him?

A. I attended school a few days at the home village school about 5 years ago. I did not like the village school so I quit.

Q. Will you please tell me why you claim you have lived in China up to the time you were 16 years old without attending school at all except for those few days, when it is customary for Chinese children to be put in school at least at the age of ten?

A. My mother told me to begin school at the age of 16."

(Id., p. 29.)

II.

CHIN SUNG testified in connection with the present [20] application on September 4, 1930, as follows:

Q. "What did you do to occupy your time from the date of your departure from San Francisco on June 22, 1928, until your return to this country in July, 1930?

A. I had no occupation, just stayed around home.

Q. Did you immediately proceed to your home village after you arrived in Hongkong?

A. I stayed at Hongkong about two days before doing so.

* * * * * * * *

Q. Did you make any visits away from your

home village while you were there on your last trip, on which occasions you remained away over night?

A. I just made one trip to Hongkong in CR.–18, the early part of the 12th month (Jan. 1930). I stayed in Hongkong only one day.

* * * * * * * *

Q. "Where is your first wife buried?

A. At the HAI NGAI HILL, between 1 or 2 lis back or south of my village.

Q. Is that where her remains are at the present time? A. Yes."

(Id., p. 15.)

Q. "Where is your mother buried at the present time? A. In the HAI NGAI HILL.

Q. Is she buried in the same grave with your father? A. Yes.

Q. Are your parents buried close to your first wife in that same hill?

A. About 7 or 8 jungs (70 or 80 feet) away.

* * * * * * * *

Q. While you were there in China on your last trip, on how many occasions did you visit the graves of your parents?

A. I visited their graves during Ching Ming Festival in CR.–18 and 19 (1929 and 1930).

Q. Did you make just one visit to those graves in CR.–19 (1930)? A. Yes.

Q. On this occasion did you also visit your wife's grave? A. Yes.

Q. Name all of the persons who accompanied

you on that visit which you made to those graves this year?

A. Just the applicant accompanied me."

(Id., p. 17.)

"Q. Will you again state the location of the HAI NGAI HILL with reference to your home village?

A. It is 3 or 4 lis back of my village."

(Id., p. 33.) [21]

CHIN WING testified on September 4, 1930, as follows:

Q. "When and where were you born?

A. In ST.–3–9–15 (Nov. 5, 1911) at LAN ON VILLAGE, SND CHINA.

Q. Have you resided continuously in that village from the time of your birth until you came to this country? A. Yes."

(Id., p. 22.)

Q. "Where is your mother buried?

A. In HAI NGAI HILL, a little over one li east of my village.

Q. Is it directly east of you village?

A. No, it is northeast.

Q. Which way does your village face?

A. North.

Q. Then HAI NGAI HILL is beyond the front of your village. Is that right?

A. Yes."

(Id., p. 24.)

III.

CHIN WING testified on September 5, 1930, as follows:

Q. "You previously stated that in CR.–12 (1923) brick walls were erected for your large house. Do you mean that they took the house down completely and rebuilt it?

A. No (changes). The whole house was taken down.

* * * * * * * *

Q. Describe that house the way it was when you came to this country?

A. It is a regular five room brick house with tile floors in every room; the open court is paved with stone. There are two outside doors, the large door facing east; in each of the bedrooms there is a window protected by iron bars and wooden doors. There is a double skylight in each bedroom and a single skylight in each kitchen, all covered with glass."

(Id., p. 29.)

CHIN SUNG testified on September 4, 1930, as follows:

Q. "After your arrival in China on your last trip, which room in your house did you occupy?

A. The parlor of my house.

Q. Who occupied that parlor with you?

A. My wife, my son CHIN GAY and my daughter.

Q. Which room did the family of your son CHIN TONG live in? [22]

A. "They lived in the large door bedroom, or east side bedroom.

Q. Who occupied the small door bedroom?

A. CHIN WING and his wife.

Q. When you arrived at home CHIN WING had not yet married, had he? A. No.

Q. Was that room vacant when you first came home?

A. Yes. When my second son CHIN FANG was in the village he lived in that room with his family. I understand that that room was vacant from the time his family moved away at the end of CR.–15 (1926)."

(Id., p. 19.)

Q. "Describe your house in LAN ON VILLAGE?

A. The old house was torn down and rebuilt in CR.–12 (1923) after I came to this country in CR.–11 (1922). It is a regular five room one-story brick building with tile floors, with two outside entrances, the large door facing east, a window in each of the bedrooms facing the alleys, provided with wooden shutters and iron bars, no glass panes; a single skylight in each of the kitchens, covered with a piece of board. I do not know how many skylights there are in the bedrooms because I did not enter them while I was in China during my last trip. They are occupied by my daughters-in-law and I am not supposed to enter them.

Q. One of those bedrooms was empty for a time, before CIN WING got married?

A. I did not enter that room at all."

(Id., p. 20.)

Q. "What is the marriage name of this applicant, CHIN WING?

A. CHIN NGEE NGEW.

Q. When and where was he married?

A. CR.–17–12–6 (Jan. 16, 1929) at LAN ON VILLAGE."

(Id., p. 16.)

_____,

United States Attorney,
Attorney for Respondent.

[Endorsed]: Filed March 9, 1931. [23]

No. 20,464–S.

PETITIONER'S EXHIBIT "A."

Findings and Decision of Board of Special Inquiry.

29394/3–23. 9–5–30. pg. 22.

SUMMARY.

BY CHAIRMAN:

This applicant claims to be 20 years old, born ST.–3–9–15 (Nov. 5, 1911), at the LAN ON VILLAGE, S. N. D. CHINA. He is applying for admission to this country as a *bona fide* natural son of CHIN SUNG, *alias* CHIN NGEE MOON, a native born citizen of the United States whose status as such has been conceded by this Service on numerous occasions. I believe it will have to be conceded at this time.

The alleged father has made five trips to China. He departed on his third trip to China on January 9, 1911, and returned April 24, 1912. This trip establishes the presence of the alleged father in

China at a time to make possible for him to render paternity to a child of the birth date claimed for this applicant. When the alleged father returned from this trip to China he claimed to have been married to LOK SHEE in KS. 24 (1898), and to have had three sons. He gave the data concerning the third son as follows: CHIN WING, 2, born ST. 3–9–15 (Nov. 5, 1911). The alleged father has consistently claimed a son of similar name and birth date ever since that time. He departed on his fourth trip to China on August 21, 1920, and returned September 13, 1922. He departed on his last trip to China June 22, 1928, and returned in company with the applicant on July 23, 1930.

The alleged father has been married twice, claiming his first wife, the mother of this applicant, died in CR.–8–10 (Nov. 1919), and that he remarried to LOK SHEE on CR. 9–9–21 (Nov. 1, 1920). He claims to have a son and a daughter by his second wife. He has already secured the admission of his oldest alleged sons, CHIN TONG was admitted to this country in *192*. He has made one trip to China, departed December 22, 1917, and returning July 16, 1919. The second alleged son CHIN FANG was admitted to this country in October, 1922. He secured Form 430 and departed for China February 20, 1926, and it is claimed he is now in Canton City studying at the University there.

Statements have been taken from the alleged father and the applicant. The alleged p. l. brother CHIN TONG is going to give his testimony at

Denver, Colorado. The attorney of record has furnished his address as the Grandview Cafe, 1111 Broadway St., Denver, Colorado. Before this case is finally decided I believe the entire record should be referred to our Denver Office for the purpose of accepting the testimony of CHIN TONG. He should present his affidavit at that time.

I therefore move that final action in this case be deferred pending the result of this hearing of CHIN TONG at Denver, Colorado, and the return of all evidence to this station.

By Member McNAMARRA: I second the motion.

By Member DOWNIE: I concur. [24]

By CHAIRMAN: This case was deferred by the Board of September 5, 1930, for the purpose of securing the testimony of CHIN TONG, the alleged p. l. brother, who was to testify at Denver, Colorado. The entire record was referred to our Denver Office on Sept. 11th. On Sept. 15th the testimony of CHIN TONG was obtained and under date of Sept. 17th the entire record was returned to this Office and is now before the Board for its consideration. As the alleged father had not yet been physically compared with the applicant he has been brought over today for this purpose. NOTE: The applicant and the alleged father have now been brought into the Board Room.

By CHAIRMAN to BOARD MEMBERS: What is the individual opinion of each member of the Board as to the resemblance, if any, between the applicant and his alleged father?

By CHAIRMAN: I note no resemblance between these two persons before me.

By Member HECKERT: I see no resemblance whatsoever between the applicant and his alleged father.

By Member DOWNIE: I do not note any resemblance that would lead me to believe that the two persons before me are father and son as claimed.

By CHAIRMAN: (Applicant and alleged father dismissed from Board Room.)

This applicant's and the alleged father's testimony has been compared with that of the p. l. alleged brother. Disagreements and discrepancies have arisen among which are the following:

The alleged father states (Pgs. 6, 7, and 22) that this applicant has been attending school in Sun Ning City, that he does not know what year the applicant first started to attend school there; that the applicant also attended the Oon Mook School *not from* the head of his village. He further stated the applicant has never attended any other school besides these two to his knowledge. He further stated that the applicant first started school at either 7 or 8 years of age; that he himself was in this country when the applicant started to go to school. It is claimed that the applicant is now 20 years old, which would make it 12 or 13 years ago that he first started school, according to the alleged father. This would be 1917 or 1918. A reference to the file of the alleged father shows he was in the United States from April, 1913, to August 21, 1920, when he departed for China on his second last trip,

returning Sept. 13, 1922. On page 22 the alleged father was asked how he knew that this applicant first started to school when he was 7 or 8 years old and he answered that he did not know for certain that he merely guessed at that. He further stated that during his visits that he made to China this applicant was actually attending school in the home village, except on his last trip when the applicant was attending school in Sunning City. He further stated that during the entire period of time that he was in China on his second last trip from 1920 to 1922 the applicant attended school in the home village; that at that time there was only one school in his village and that was the Oon Mook School, and that the applicant had a summer vacation in that school. The alleged brother CHIN TONG don't know anything about the applicant's schooling. APPLICANT states (pgs. 15, 16, & 18) that he has been attending school in Sunning City ever since he first started [25] school there in CR. 15 (1926). He was asked if he ever attended any other school and he answered "No." He further stated there was a school in his home village named Oon Mook School which stands alone at the head of the village. He further claimed he stopped attending school in Sunning City at the end of last year and that he attended that school for four years. He was asked if he only attended school four years altogether and he answered "Yes." He was asked if he first started to attend school when he was about 16 years old and he answered "Yes." He was asked why he didn't attend school in his home vil-

lage and he stated because he wanted to attend school in Sun Ning City. He was further asked if he ever at any time attended school at the Oon Mook School in his village and he answered "No." He was confronted with the fact that he disagreed with hi*m* father on this point and then he attempted to change his testimony slightly by stating that he attended school in the home village for a "few days" about five years ago but did not like it and so he quit. He was asked to state the reason why he claimed to have lived in China up to the time he was 16 years old without attending school at all except for those few days, when it was customary for Chinese children to be put in school at least at the age of ten years, and his answer was that his mother told him to begin school at the age of 16. I*t* these two persons were father and son as claimed there certainly would be no such disagreement as this in the record.

The alleged father states (pg. 4) that his first wife (applicant's mother) is buried at the Hai Ngai Hill, between 1 and 2 lis back or south of his village. He further stated his parents were also buried in that hill. On page 22, he was asked to again state the location of the Hai Ngai Hill with reference to his home village and he stated it was 3 or 4 lis back of his village. Applicant states (pg. 13) that his own mother was buried in Hai Ngai Hill, a little over one li east of his village. He was asked if it was directly east of his village and he stated it was northeast. He further stated his village

faced north and that Hai Ngai Hill was beyond the front of his village.

A peculiar situation arose in regard to the description of the alleged father's house in the home village. When the alleged father was questioned (pg. 9) in regard to his house he stated he did not know how many skylights there were in the bedrooms because he did not enter them while he was in China during his last trip; that they were occupied by his daughters-in-law and he was not supposed to enter them. His attention was called to the fact that one of those bedrooms was empty for a time before CHIN WING, the applicant was married and he stated that he did not enter that room at all. Our record show the alleged father departed for China on June 22, 1928, and that CHIN WING was married Jan. 16, 1929. There is a period of about six months between these two dates after allowing nearly a month for the alleged father to get home. It appears preposterous to me for the alleged father to state that he did not enter that bedroom at all during about six months before the applicant was married. This situation when taken with others that appeared in the record lead me strongly to the opinion that the principals in this case were testifying from a prepared story on certain happenings and when given questions that they were not prepared for they became evasive and tried to keep from answering definitely.

There are other disagreements that may be found by reference to the record. [26]

From all the evidence adduced and presented in this case I am of the opinion that this applicant has not reasonably established that he is actually a *bona fide* natural son of CHIN SUNG, *alias* CHIN NGEE MOON, a native born citizen of the United States and for that reason and for the further reason that the "burden of proof" as required by Section 23 of the Immigration Act of 1924 has not been sustained I move that this applicant be denied admission to this country and ordered deported to the country when he came.

By Member HECKERT: I second the motion.

By Member DOWNIE: I concur.

[Endorsed]: Filed Dec. 19, 1930. [27]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 9th day of March, in the year of our Lord one thousand nine hundred and thirty-one. Present: The Honorable A. F. ST. SURE, Judge.

[Title of Court and Cause.]

MINUTES OF COURT—MARCH 9, 1931—ORDER SUBMITTING APPLICATION ON BRIEFS.

The application for writ of habeas corpus (by order to show cause) came on to be heard. A. E.

Bagshaw, Esq., Asst. U. S. Atty., appearing for respondent, and no one appearing for petitioner. Mr. Bagshaw filed the record of the Bureau of Immigration and excerpts of testimony. After hearing Mr. Bagshaw, ORDERED application submitted on briefs to be filed in 10 and 5 days. [28]

[Title of Court and Cause.]

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS, ETC.

This matter having been heard on the application for a writ of habeas corpus (by order to show cause), and having been argued and submitted,—

IT IS ORDERED, after a full consideration, that the application for a writ of habeas corpus be, and the same is hereby DENIED; that the petition be, and the same is hereby DISMISSED; that the order to show cause be, and the same is hereby DISCHARGED; and that the applicant be deported by the United States Immigration Authorities at San Francisco, California.

Dated: May 25, 1931.

A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed May 25, 1931. [29]

[Title of Court and Cause.]

NOTICE OF MOTION FOR REHEARING.

To JOHN D. NAGLE, Esq., Commissioner of Immigration for the Port of San Francisco, Respondent, and GEORGE J. HATFIELD, Esq., United States Attorney, Attorney for Respondent:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that hereafter, to wit, on Monday, the 8th day of June, 1931, at 10 o'clock A. M., or as soon thereafter as counsel may be heard, at the courtroom of the above-entitled court, at the Post-office Building, San Francisco, California, the undersigned will move the above-entitled court for a rehearing of the above-entitled cause, to the end that the order and judgment heretofore made and entered denying a petition for a writ of habeas corpus may be vacated and that an order and judgment granting the petition may be made and entered herein.

Said motion will be based upon the ground that the order and judgment heretofore made and entered denying a petition for a writ of habeas corpus was made and entered by mistake of law and upon all the files, proceedings and documents herein and upon this notice of motion.

Dated this 29th day of May, 1931.

STEPHEN M. WHITE,
Attorney for Petitioner. [30]

CERTIFICATE OF COUNSEL.

I, the undersigned, counsel for petitioner in the above-entitled cause, hereby certify that in my judgment the foregoing motion for a rehearing of the said cause is well founded in point of law as well as in fact and that said motion is not interposed for delay.

Dated this 29th day of May, 1931.

STEPHEN M. WHITE,
Attorney for Petitioner.

[Endorsed]: Service and receipt of a copy of the within notice of motion for rehearing, is hereby admitted this 29th day of May, 1931.

GEORGE J. HATFIELD,
United States Attorney.
Attorneys for Respondent.

Filed May 29, 1931. [31]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 8th day of June, in the year of our Lord one thousand nine hundred and thirty-one. Present: The Honorable A. F. ST. SURE, District Judge, et al.

[Title of Court and Cause.]

MINUTES OF COURT—JUNE 8, 1931—ORDER DENYING MOTION FOR WRIT OF HABEAS CORPUS.

The motion for rehearing and/or for reconsideration of the application for a writ of habeas corpus came on to be heard. After argument, IT IS ORDERED that said motion be and the same is hereby denied. [32]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the Above-entitled Court, to JOHN D. NAGLE, Commissioner of Immigration, and to GEORGE J. HATFIELD, Esq., United States Attorney, His Attorney:

You and each of you will please take notice that Louie Yee Hong, the petitioner in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment rendered, made and entered herein on May 25, 1931, denying the petition for a writ of habeas corpus filed herein.

Dated this 18th day of June, 1931.

STEPHEN M. WHITE,
Attorney for Appellant. [33]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now Louie Yee Hong, the petitioner in the above-entitled matter, through his attorney, Stephen M. White, Esq., and respectfully shows:

That on the 25th day of May, 1931, the above-entitled court made and entered its order denying the petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the preju dice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, the appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, for the correction of the errors as complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit thereof, and further, that the said appellant be held within the jurisdiction of this court during the pendency of the appeal herein, so that he may be produced in execution of whatever judgment may be finally entered herein.

Dated at San Francisco, California, June 18, 1931.

STEPHEN M. WHITE,
Attorney for Appellant. [34]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the appellant, Chin Wing, through his attorney, Stephen M. White, Esq., and sets forth the errors he claims the above-entitled court committed in denying his petition for a writ of habeas corpus, as follows:

I.

That the court erred in not granting the writ of habeas corpus and discharging the appellant, Chin Wing, from the custody and control of John D. Nagle, Commissioner of Immigration at the Port of San Francisco.

II.

That the court erred in not holding that it had jurisdiction to issue the writ of habeas corpus as prayed for in the petition on file herein.

III.

That the court erred in not holding that the allegations set forth in the petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus. [35]

IV.

That the court erred in holding that the claimed discrepancies in the testimony, as a result of the evidence adduced before the immigration authorities, were sufficient, in law, to justify the conclusion of the immigration authorities that the claimed

relationship between the alleged father of appellant and appellant did not exist.

V.

That the court erred in not holding that the claimed discrepancies in the testimony, as a result of the evidence adduced before the immigration authorities, were not sufficient, in law, to justify the conclusion of the immigration authorities that the claimed relationship between the alleged father of appellant and appellant did not exist.

VI.

That the court erred in holding that the claimed discrepancies, or any of them, in the testimony, as a result of the evidence adduced before the immigration authorities, were not subject to a reasonable explanation and reconcilable

VII.

That the court erred in not holding that any and all of the claimed discrepancies in the testimony, as a result of the evidence adduced before the immigration authorities, were subject to a reasonable explanation and reconcilable.

VIII.

That the court erred in holding that the evidence adduced before the immigration authorities was not sufficient, in kind and character, to warrant a finding by the immigration authorities that the claimed relationship between the alleged father of appellant and appellant existed.

IX.

That the court erred in not holding that the evidence adduced before the immigration authorities was sufficient, in kind and [36] character, to warrant a finding by the immigration authorities that the claimed relationship between the alleged father of appellant and appellant existed.

X.

That the court erred in holding that there was substantial evidence before the immigration authorities to justify the conclusion that the claimed relationship between the alleged father of the appellant and the appellant did not exist.

XI.

That the court erred in not holding that there was no substantial evidence before the immigration authorities to justify the conclusion that the claimed relationship between the alleged father of the appellant and the appellant did not exist.

XII.

That the court erred in holding that the appellant was accorded a full and fair hearing before the immigration authorities.

XIII.

That the court erred in not holding that the appellant was not accorded a full and fair hearing before the immigration authorities.

WHEREFORE, appellant prays that the said order and judgment of the United States District Court for the Northern District of California made, given

and entered in the office of the Clerk of said court on the 25th day of May, 1931, denying the petition for a writ of habeas corpus, be reversed and that he be restored to his liberty and go hence without day.

Dated at San Francisco, California, June 18, 1931.

STEPHEN M. WHITE,
Attorney for Appellant. [37]

[Endorsed]: Due service and receipt of a copy of the within notice of appeal, etc., is hereby admitted this 18th day of June, 1931.

GEO. J. HATFIELD,
United States Attorney,
Attorneys for Appellee.

Filed June 18, 1931. [38]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

It appearing to the above-entitled court that Louie Yee Hong, the petitioner herein, has this day filed and presented to the above court his petition praying for an order of this court allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and order of this court denying a writ of habeas corpus herein and dismissing his petition for said writ, and good cause appearing therefor,—

IT IS HEREBY ORDERED that an appeal be and the same is hereby allowed as prayed for herein; and

IT IS HEREBY FURTHER ORDERED that the Clerk of the above-entitled court make and prepare a transcript of all the papers, proceedings and records in the above-entitled matter and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit within the time allowed by law; and

IT IS FURTHER ORDERED that the execution of the warrant of deportation of said Chin Wing, be and the same is hereby stayed pending this appeal and that the said Chin Wing, be not removed from the jurisdiction of this court pending this appeal.

Dated at San Francisco, California, June 18, 1931.

A. F. ST. SURE,
United States District Judge. [39]

[Endorsed]: Due service and receipt of a copy of the within order allowing appeal is hereby admitted this 18th day of June, 1931.

GEO. J. HATFIELD,
United States Attorney,
Attorneys for Appellee.

Filed June 18, 1931. [40]

[Title of Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the Immigration Records filed as exhibits herein, may be transmitted by the Clerk of the above-entitled court to

and filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to be taken as a part of the record on appeal in the above-entitled cause with the same force and effect as if embodied in the transcript of record and so certified by the Clerk of this court.

Dated this 18th day of June, 1931.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Due service and receipt of a copy of the within order transmitting original exhibits is hereby admitted this 18th day of June, 1931.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Appellee.

Filed June 18, 1931. [41]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please issue copies of following papers for transcript on appeal:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Appearance of respondent, etc.
4. Respondent's memorandum of excerpts of testimony from the original immigration record.
5. Petitioner's Exhibit "A"—Findings and decision of Board of Special Inquiry.

6. Minute order respecting introduction of original immigration records.
7. Order denying petition for writ of habeas corpus.
8. Notice of motion for rehearing.
9. Order denying motion for rehearing.
10. Notice of appeal.
11. Petition for appeal.
12. Assignment of errors.
13. Order allowing appeal.
14. Order transmitting original immigration records.
15. Praecipe.

STEPHEN M. WHITE,
Attorney for Appellant.

[Endorsed]: Filed July 2, 1931. [42]

[Title of Court.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 42 pages, numbered from 1 to 42, inclusive, contain a full, true, and correct transcript of the records and proceedings in the Matter of Chin Wing, on Habeas Corpus, No. 20,464–S., as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on ap-

peal is the sum of Fourteen Dollars and Ninety-five Cents ($14.95), and that the said amount has been paid to me by the attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of July, A. D. 1931.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [43]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco, and GEORGE J. HATFIELD, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within 30 days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Chin Wing, is appellant and you are appellee, to show cause, if any, why the decree rendered against the said appellant, as in the said order allowing appeal men-

tioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States District Judge for the Southern Division of the Northern District of California, this 18th day of June, 1931.

A. F. ST. SURE,
United States District Judge. [44]

Due service and receipt of a copy of the within citation on appeal, is hereby admitted this 18th day of June, 1931.

GEORGE J. HATFIELD.
GEORGE J. HATFIELD,
United States Attorney
Attorneys for Appellee.

Filed Jun. 18, 1931, 4:40 P. M. [45]

[Endorsed]: No. 6529. United States Circuit Court of Appeals for the Ninth Circuit. Chin Wing, Appellant, vs. John D. Nagle, Commissioner of Immigration, Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 21, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Frank H. Schmid,
Deputy Clerk.

No. 6529

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHIN WING,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLANT.

STEPHEN M. WHITE,
576 Sacramento Street, San Francisco,
Attorney for Appellant.

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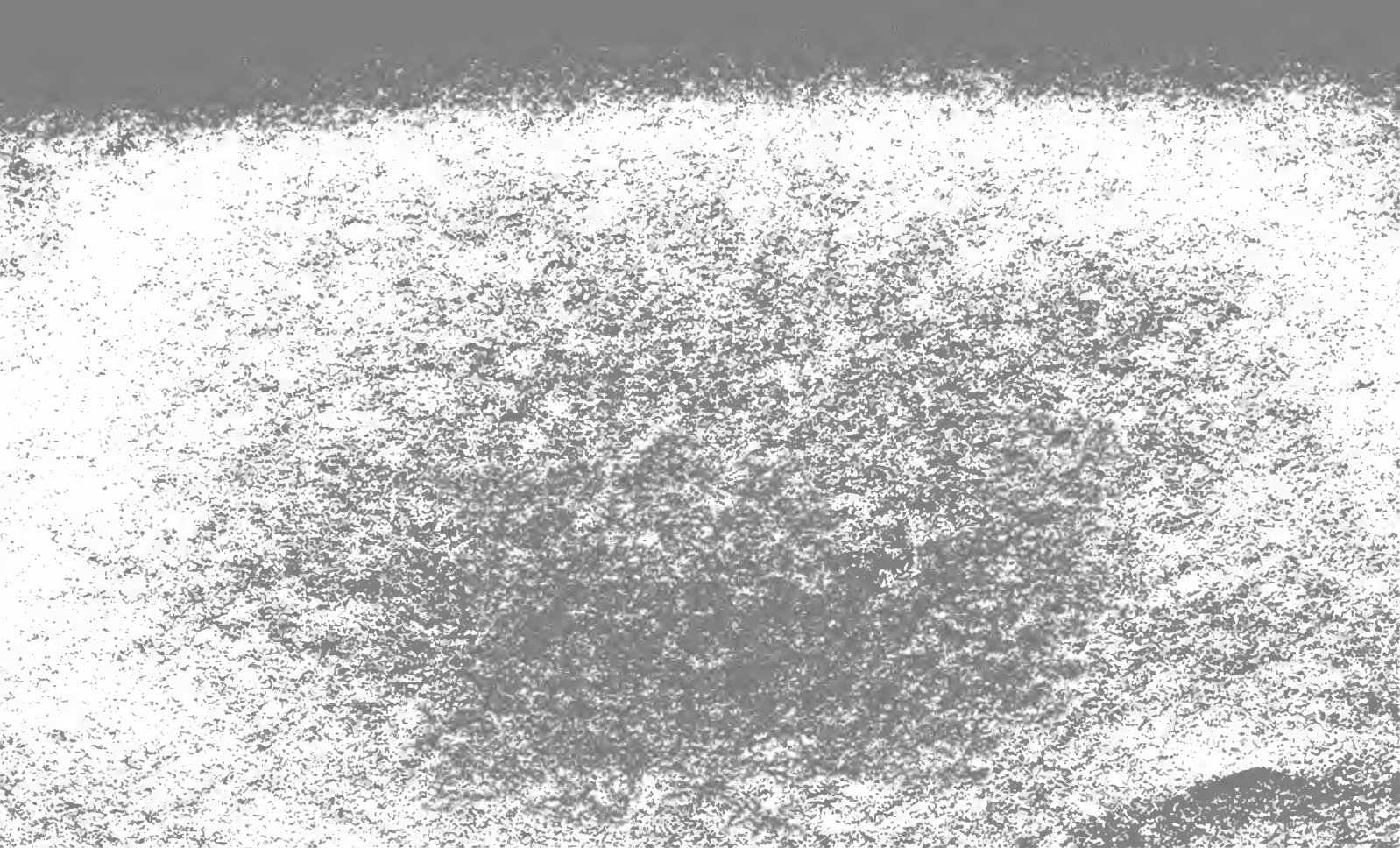

Subject Index

	Page
Statement of the case	1
Preliminary facts	2
The question in the case	3
Argument	8
The evidence adduced in behalf of the appellant established to a reasonable certainty that he was the son of his alleged father	8
The alleged testimonial discrepancies do not afford substantial ground for rejecting the affirmative evidence adduced in behalf of the appellant	15
Conclusion	32

Table of Authorities Cited

	Pages
Chung Pig Tin v. Nagle, 45 Fed. (2d) 484, C. C. A. 9th	14
Gambroulis v. Nash, 12 Fed. (2d) 49, C. C. A. 8th	15
Go Lun v. Nagle, 22 Fed. (2d) 246, C. C. A. 9th	7,14, 21, 26, 31
Gung Yow v. Nagle, 34 Fed. (2d) 848, C. C. A. 9th	7
Hom Chung v. Nagle, 41 Fed. (2d) 126, C. C. A. 9th	7, 22, 23, 31, 32
Johnson v. Ng Ling Fong, 17 Fed. (2d) 11, C. C. A. 1st	10
Louie Poy Hok v. Nagle, 48 Fed. (2d) 753, C. C. A. 9th	7, 11, 21
Nagle v. Dong Ming, 26 Fed. (2d) 438, C. C. A. 9th	21
Nagle v. Jin Suey, 41 Fed. (2d) 522, C. C. A. 9th	7, 20, 21
Ng Fung Ho v. White, 259 U. S. 276, 42 S. Ct. 494, 66 L. Ed. 938	16
Ng Yuk Ming v. Tillinghast, 28 Fed. (2d) 547, C. C. A. 9th	11
Tang Tun v. Edsell, 223 U. S. 673, 32 S. Ct. 359, 56 L. Ed. 606	16
United States v. Ju Toy, 198 U. S. 253, 25 S. Ct. 644, 49 L. Ed. 1040	16
Weedin v. Lee Gan, 47 Fed. (2d) 886, C. C. A. 9th	15
Whitfield v. Hanges, 222 F. 745, 138 C. C. A. 199	16
Wong Bing Pon v. Carr, 41 Fed. (2d) 604, C. C. A. 9th	19
Young Len Gee v. Nagle, No. 6496, C. C. A. 9th, decided Nov. 13, 1931	7, 15, 26, 32

No. 6529

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHIN WING,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal taken from the order of the District Court for the Northern District of California denying a petition for a writ of habeas corpus. (Tr. of R., p. 40.)

The appellant, a male Chinese, claims to have been born in China on November 5, 1911. He arrived at the Port of San Francisco on July 23, 1930, and, thereupon, applied to the immigration authorities for admission to the United States under a citizenship status, claiming that he was the son of Chin Sung, a native citizen of the United States. (Section 1993 of Revised Statutes.) A Board of Special Inquiry, which

was convened at the port, decided that the appellant was not the son of Chin Sung, his alleged father, but conceded that the latter was a native citizen of the United States. Upon appeal to the Secretary of Labor, the decision of the Board of Special Inquiry was affirmed and the appellant was ordered deported. Being held in alleged unlawful custody for the purpose of deportation, proceedings in habeas corpus were instituted.

In the Court below, the original immigration records (Exhibits "A" to "E") were filed as part of the petition and these records have by order of Court been transmitted as part of the record on appeal. (Tr. of R., p. 49.)

PRELIMINARY FACTS.

The records of the immigration service disclose that Chin Sung, the appellant's alleged father, was born in the United States and that he has made five trips to China, as follows:

First. Departed in 1885 and returned in 1889;

Second. Departed in 1905 and returned in 1906;

Third. Departed January 9, 1911, and returned April 24, 1912;

Fourth. Departed on August 21, 1920, and returned on September 13, 1922;

Fifth. Departed on June 22, 1928, and returned on July 23, 1930, in company with the applicant. (Tr. of R., p. 21.)

The alleged father was twice married. His first wife, Lok Shee, died in November, 1919. He married his second wife, also named Lok Shee, on November 1, 1920. By his first wife, he had three sons, namely, Chin Tong, who came to the United States on April 24, 1912, and who thereafter made one trip to China, departing from the United States on December 22, 1917, and returning thereto on July 16, 1919; Chin Fang, who came to the United States on September 13, 1922, who remained in the United States until February 20, 1926, when he departed for China, and who is attending a university at Canton City; Chin Wing, who is said to be the appellant and who was born at Lan On Village, Sun Ning District, China, on November 5, 1911, incident to the alleged father's third trip to China between January 9, 1911, and April 24, 1912. By his second wife, the alleged father claims to have had one son and one daughter, neither of whom has ever been to the United States. (Findings of Board of Special Inquiry, Tr. of R., pp. 32-33.)

THE QUESTION IN THE CASE.

In denying the existence of the relationship between the appellant and his alleged father, the Secretary of Labor, through his Board of Review, found and decided, as follows:

"55735/639 San Francisco December 12, 1930.

In re: Chin Wing, age 19.

This case comes before the Board of Review on appeal from a decision of a Board of Special

Inquiry at San Francisco denying admission as the son of a native citizen of the United States. The citizenship of the alleged father being conceded, the question at issue is relationship.

Attorney George W. Hott has filed a brief, Attorneys White and White at the port.

The record shows that the alleged father was in China at a time to make possible his paternity to a child of the applicant's asserted age and that in 1912 he claimed to have a son of the name and birthdate given by and for this applicant. The alleged father who was last in China from 1928 until he left there in company with the applicant, and an alleged brother who was admitted in 1912 and subsequently visited China from 1917 to 1919 appeared to testify. The testimony discloses such disagreements as the following:

The alleged father testifies that when he was in China from 1920 to 1922 his son, whom the applicant claims to be, was attending school in the home village and on recall he repeats and strengthens the statement saying that during the entire period from 1920 to 1922 the applicant was attending school in the home village. The applicant on the other hand testifies that he never attended any other school than one in Sun Ning City and that he did not start school there until 1926 when he was by Chinese reckoning sixteen years old. When he was advised that his testimony disagreed with that of his alleged father he changed his statement saying he did go to the village school for a few days about five years ago, which would be after the alleged father was at home from 1920 to 1922. In explanation of the unusual character of his statement that he did

not start school until he was sixteen, he says that his mother was responsible for his starting to go to school at the age of sixteen. The attorney's attempt to resolve this discrepancy on the theory that the applicant played truant and, while his alleged father thought that he was attending school, was actually not attending school, might be acceptable if it were offered to account for a period of a day or two. It is not in the opinion of the Board of Review reasonable to believe that for a period of more than a year when the alleged father was at home he would not have learned that the applicant was playing truant when he was supposed to be in school especially when they both claim to have been living in the same house in a little village of fifty or sixty houses. Moreover, the applicant's testimony that he did not start to go to school until four or five years ago contradicts not only the testimony of his alleged father but also the testimony given by his alleged brother Chin Tong in 1922 when he appeared on behalf of another alleged brother then applying for admission and answered the question 'What was your brother Chin Wing (this applicant) doing when you were last in China?' by saying, 'Going to school.' As noted above, this alleged brother Chin Tong was last in China from 1917 to 1919 and the context of Chin Tong's statement just quoted shows that he meant that his brother, whom this applicant claims to be, was attending school in the home village. It is not conceivable that both the alleged father and a prior landed alleged brother of the applicant would have believed that he was attending school in the home village when one of them was at home for two years from 1917 to 1919 and the other

from 1920 to 1922 if he was actually not attending school in the home village. Such a discrepancy as this could not reasonably be expected to appear as between the applicant and his witnesses, if his relationship to them were actually as claimed.

The alleged father states that the family burial place is located one or two lis south of the home village. The applicant states that his family burial place is located about a li northeast of his home village. If this were merely a disagreement as to directions described by reference to the cardinal points of the compass, it might not be held to be definite and serious, but it is made definite by the fact that the alleged father places the burial place behind the village whereas the applicant places it in front.

In addition to the above noted discrepancies, the Chairman of the Board at the port notes in his summary the statement of the alleged father that he is not able to tell whether there are skylights and lofts in the bedrooms of his house because he did not enter those bedrooms during his last stay in China from 1928 until this year. He gives as the reason for his not entering those rooms that they were occupied by his daughters-in-law. But when he is reminded that one of the said daughters-in-law did not come to his house within some six months after he went home in 1928 and he nevertheless repeats that he did not enter those rooms. It would, as the Chairman comments, be difficult to believe that the alleged father who as he says had no occupation and stayed around home lived for six months in a small house of five rooms and did not enter two of them when so far as the record shows there

was no reason why he should not go into one of the two.

It is the opinion of the Board of Review that a record which contains such features as those noted above fails reasonably to establish the applicant's claim to be the son of his alleged father.

It is, therefore, recommended that the appeal be dismissed.

Havard S. Eby,
Acting Chairman, Sec'y. & Comr.
Genl's Board of Review.

EJW/ws
So Ordered:
W. W. Smelser,
Assistant to the Secretary."
(Immigration Record, Exhibit "A," pp. 69-68.)

In behalf of the appellant, it is contended that the evidence submitted on his application for admission so conclusively established the alleged relationship that the order of exclusion was arbitrary and unfair.

Young Len Gee v. Nagle, No. 6496, C. C. A. 9th, decided November 13, 1931;

Go Lun v. Nagle, 22 Fed. (2d) 246, C. C. A. 9th;

Hom Chung v. Nagle, 41 Fed. (2d) 126, C. C. A. 9th;

Louie Poy Hok v. Nagle, 48 Fed. (2d) 753, C. C. A. 9th;

Nagle v. Jin Suey, 41 Fed. (2d) 522, C. C. A. 9th;

Gung Yow v. Nagle, 34 Fed. (2d) 848, C. C. A. 9th.

ARGUMENT.

THE EVIDENCE ADDUCED IN BEHALF OF THE APPELLANT ESTABLISHED TO A REASONABLE CERTAINTY THAT HE WAS THE SON OF HIS ALLEGED FATHER.

On November 14, 1906, incident to his return to the United States from his second trip to China, Chin Sung, the appellant's alleged father, was questioned by the immigration authorities as to his marital status and he gave the following testimony:

"Q. Are you married?
A. Yes."
(Immigration Record, Exhibit "C," p. 15.)

On April 23, 1912, incident to his return to the United States from his third trip to China, he was again questioned by the immigration authorities as to his marital status, as well as in respect to his children, and, upon that occasion, he testified that he was married in 1898 to Lok Shee and that he had three sons by her, his third son being as follows: Chin Wing, aged 2 years, born ST. 3-9-15, the equivalent American date being November 5, 1911. (Immigration Record, Exhibit "E," p. 39.) He thereafter consistently claimed a son, who bears the same name and who was born on the same date as the appellant, on the following occasions: In April, 1912, incident to the application for admission to the United States of his oldest son, Chin Tong (Immigration Record, Exhibit "B," p. 47); in August, 1920, incident to his departure from the United States on his fourth trip to China (Immigration Record, Exhibit "E," p. 27); in September, 1922, incident to the application for admission to the United States of his second son, Chin Fang (Immi-

gration Record, Exhibit "D," p. 16); in June, 1928, incident to his departure from the United States on his fifth trip to China (Immigration Record, Exhibit "E," p. 10); in July, 1930, incident to his return to the United States. (Immigration Record, Exhibit "E," p. 3.)

The appellant's oldest brother, Chin Tong, arrived in this country on April 24, 1912, and, upon the hearing of his case, he was questioned by the immigration authorities as to his family and he stated that he had a brother named Chin Wing born "the 9th month, 15th day of last year" (1911), the equivalent date in American reckoning being November 5, 1911. (Immigration Record, Exhibit "B," p. 52.) Chin Tong departed on his only trip to China on December 22, 1917, at which time he again testified before the immigration authorities that he had a brother whose name and age correspond with those of the appellant. (Immigration Record, Exhibit "B," p. 20.)

The appellant's second brother, Chin Fang, arrived in the United States on September 13, 1922, and, at that time, he was questioned by the immigration authorities as to his family and he stated that he had a brother named Chin Wing, aged 12 years. (Immigration Record, Exhibit "D," p. 26.) Chin Fang departed for China on February 20, 1926, at which time he again testified before the immigration authorities that he had a brother of the name and age of the appellant. (Immigration Record, Exhibit "D," p. 11.)

The Board of Special Inquiry said:

> "The alleged father has made five trips to China. He departed on his third trip to China

on January 9, 1911, and returned April 24, 1912. This trip establishes the presence of the alleged father in China at a time to make possible for him to render paternity to a child of the birth date claimed for this applicant. When the alleged father returned from this trip to China he claimed to have been married to Lok Shee in K. S. 24 (1898), and to have had three sons. He gave the data concerning the third son as follows: Chin Wing, 2, born S. T. 3-9-15 (Nov. 5, 1911). The alleged father has consistently claimed a son of similar name and birth date ever since that time. He departed on his fourth trip to China on August 21, 1920, and returned September 13, 1922. He departed on his last trip to China June 22, 1928, and returned in company with the applicant on July 23, 1930." (Tr. of R., pp. 32-33.)

It will, therefore, be seen that a son of the description of the appellant has been consistently mentioned by the alleged father over a period of many years, commencing in 1912, at which time the appellant was only about 5 months old, and that the alleged father's two prior landed sons, Chin Tong and Chin Fang, have also consistently mentioned a brother of the description of the appellant.

In *Johnson v. Ng Ling Fong,* C. C. A. 1st., 17 Fed. (2d) 11, the Court said:

> "The records in the Immigration Department concerning the alleged father and his family since 1909 are so complete, and the statements as to the number of births of his children have been so consistent, through this long period of time, that it is inconceivable that fair-minded men, free from bias and suspicion, should entertain any

reasonable doubt as to the relationship of the applicant and his alleged father, * * *."

In *Louie Poy Hok v. Nagle,* 48 Fed. (2d) 753, at page 755, this Court said:

> "A similar case arose in Ng Yuk Ming v. Tillinghast, 28 Fed. (2d) 547, 548 (C. C. A. 1st). There, '13 years before * * * the alleged father * * * testified before the immigration authorities that he had a son bearing the name of the applicant, * * * which he confirmed on every other occasion upon which he was called to testify.' The decision of the Court was that the decision of the immigration officials was not supported by the evidence and the prisoner was ordered released from custody. See, also, Gung Yow v. Nagle, 34 Fed. (2d) 848 (C. C. A. 9th). In the instant case the cumulative effect of the repeated assertions by the father and the previously entered alleged brothers that there was a third son, Louie Fung Leung, born October 1, 1909, certainly go farther than a mere indication that the three were suffering from a delusion; the effect of the testimony in the mind of any reasonable man must be to create the belief that there was a third son somewhere in the offing."

The witnesses for the appellant were his alleged father, Chin Sung, and his oldest prior landed brother, Chin Tong. The appellant's second prior landed brother, Chin Fang, did not appear as a witness for the reason that he departed in February, 1926, for China, where he has ever since been. (Findings of Board of Special Inquiry, Tr. of R., p. 33.) The appellant and his alleged father testified at San Fran-

cisco and their testimony covers approximately twenty-two pages, single space and small type. (Immigration Record, Exhibit "A," pp. 12-33.) The prior landed brother, Chin Tong, testified at Denver, Colorado, where he resides, and his testimony covers approximately ten pages, single space and small type. (Immigration Record, Exhibit "A," pp. 36-45.) The appellant and his witnesses were interrogated in respect to a myriad of subjects, among which were the names, ages, whereabouts of the appellant's brothers and sister, the name, age, kind of feet of the appellant's mother, when she died, where she died, the village from which she originated, the name, age, kind of feet of the appellant's step-mother, the village from which she originated, the date of marriage of the appellant's oldest brothers, the names, ages, kind of feet of the brothers' wives, the villages from which the wives originate, the names, ages, whereabouts of the children of the brothers, the names, ages of the appellant's paternal grandparents, when they died and where they are buried, the description of their graves, the distance of the graves of the paternal grandparents from that of the appellant's mother, whether or not the appellant has any paternal aunts or uncles, the names, ages and whereabouts of the appellant's maternal uncles and aunt, whether or not they are married, the names, ages and whereabouts of their children, the number of houses in the appellant's village, the number of rows in which the houses are arranged, the number, names and locations of the ancestral halls in the village, the location of the watch tower, the names of the occupants of the houses in the

village, the families of the occupants, the location of the village fish pond, the names of nearby villages and markets, the description of the family home, the domestic animals kept by the family, the route of travel from the village to Hongkong. The testimony of the witnesses is narrated in detail in the petition for a writ. (Tr. of R., pp. 4-11.)

The Board of Special Inquiry did not comment upon the manner in which the appellant and the alleged father gave their testimony, but the District Director of Immigration at Denver, Colorado, who took the testimony of the appellant's prior landed brother, Chin Tong, commented upon the manner in which this brother gave his testimony, as follows:

"U. S. Commissioner of Immigration,
San Francisco, Calif.

Reference being had to your file No. 29394/3-23, and your letter of the 11th. instant, with which you transmitted files in the case of the application of Chin Wing, for admission as the son of Chin Sung, a native, with the request that statements be taken from the alleged brother of Chin Wing, namely, Chin Tong, at Denver, Colo., be advised that such statement was taken and three copies of same are transmitted herewith, together with the files transmitted with the case, Nos. 29394/2-26, 12017/29106, 16338/6-9 and Seattle files R. S. 15551 and R. S. 1280.

The witness making the inclosed statement speaks English, seems to know considerable about the applicant, or else has been coached very thoroughly as to affairs in China in the Lan On Village, and was not at all embarrassed by the ques-

tions, nor did he seem at all non-plussed by any of the questions asked.

W. R. Manifield,
District Director of Immigration,
Denver, Colorado."

(Immigration Record, Exhibit "A," p. 46.)

In *Chung Pig Tin v. Nagle,* 45 Fed. (2d) 484, this Court said:

"Before taking up these discrepancies, real or apparent, it may be well to consider the scope of the examination out of which they arose. The testimony of the alleged father, taken at Los Angeles, covers upwards of twenty single spaced typewritten pages, and the testimony of the appellant, taken at San Francisco, covers approximately seven pages. The witnesses were interrogated as to their home life and relatives, near and remote; as to the home village; the number of houses in the village; the names of the occupants and the names of their children; the name of the school teacher and the names of his wife and children; the number of children attending school and their names; the ancestral hall and a multitude of other collateral questions. *In all of this testimony there was such general agreement, and the scope of the examination was so broad as to preclude any reasonable probability of coaching or collusion.*"

In *Go Lun v. Nagle,* 22 Fed. (2d) 246, at page 248, this Court said:

"A reading of the entire testimony of the three witnesses leaves not the slightest room for doubt that their relationship was fully established, and

that the appellant is a citizen of the United States. A contrary conclusion is arbitrary and capricious and without any support in the testimony."

Weedin v. Lee Gan, 47 Fed. (2d) 886, C. C. A. 9th;

Young Len Gee v. Nagle, supra.

THE ALLEGED TESTIMONIAL DISCREPANCIES DO NOT AFFORD SUBSTANTIAL GROUND FOR REJECTING THE AFFIRMATIVE EVIDENCE ADDUCED IN BEHALF OF THE APPELLANT.

A review of the decision of the Secretary of Labor, supra, shows that the relationship of the appellant to his alleged father has been denied on account of three so-called testimonial discrepancies, which relate to the following matters:

1. Whether or not the appellant was attending school between 1920 and 1922.

2. The direction of the burial ground from the home village.

3. Skylights in the family home.

A discussion of these several items is proper in order to determine whether or not the same afford substantial ground to overcome the burden of proof established by the affirmative evidence adduced in behalf of the appellant.

Young Len Gee v. Nagle, supra.

In *Gambroulis v. Nash,* 12 Fed. (2d) 49, C. C. A. 8th, the Court at page 52, said:

"The courts will not review the findings of the Department of Labor on the fact question in-

volved, if there is substantial evidence to support it; fraud and mistake being absent. Ng Fung Ho v. White, 259 U. S. 276, 42 S. Ct. 494, 66 L. Ed. 938; Tang Tun v. Edsell, 223 U. S. 673, 32 S. Ct. 359, 56 L. Ed. 606; United States v. Ju Toy, 198 U. S. 253, 25 S. Ct. 644, 49 L. Ed. 1040; Whitfield v. Hanges, 222 F. 745, 138 C. C. A. 199. Whether there is any substantial evidence presented at the hearing to support the charge is a question of law, reviewable by the court. Whitfield v. Hanges, 222 F. 745, 138 C. C. A. 199."

1. Whether or Not the Appellant Was Attending School Between 1920 and 1922.

It is conceded that the appellant and his alleged father agreed that for the past few years or since 1926 the appellant has been attending school at Sun Ning City, which is located about three pos (about 30 miles) from the home village of Lan On. (Tr. of R., pp. 21-27.) However, when asked as to the place where the appellant attended school during his visit to China between 1920 and 1922, the alleged father stated that the appellant was attending school in the home village (Tr. of R., p. 24), whereas the appellant stated that he had never attended school in the home village, except for a few days about five years ago; the appellant did not deny that he was in the home village between 1920 and 1922 and his testimony indicates that he was there during that period. (Tr. of R., pp. 25-27.)

There are many circumstances to be considered in respect to the testimony bearing upon this item. The appellant was of school age, being past 12 years old,

when the alleged father was in China between 1920 and 1922 and, naturally, the alleged father, even without having any definite recollection of the matter, would assume that the appellant was attending school during that period. Moreover, the alleged father has been in China only at infrequent intervals, he is the father of five children, three of whom are by his first wife and two of whom are by his second wife, his oldest son, Chin Tong, attended school in the home village prior to coming to the United States in 1912, his second son, Chin Fang, attended school in the home village prior to coming to the United States in 1922 (Tr. of R., p. 23), this second son has been attending school at Canton City since his return to China in 1926 (Tr. of R., p. 33), his third son, whom the appellant claims to be, has been attending school at Sun Ning City since 1926 until his departure for the United States, his fourth son, Chin Gay, is attending school in the home village and his daughter, Chin Yee, has not commenced to attend. Thus, it may be seen that the experiences of the four children, who have attended school, have been varied, two of the children, Chin Tong and Chin Gay, having attended school in the home village, another of the children, Chin Fang, having attended school at the home village and at Canton City, and another, the appellant, having attended at Sun Ning City. Take the usual father, who has five children, from whom he has been separated during most of his life, we believe that it may be fairly stated that he would not have very definite knowledge of the exact school experience of each child, especially if the school experiences of the chil-

dren were varied. We, therefore, submit that it is hardly fair or reasonable to expect the alleged father in this case to have a very definite or clear recollection as to whether or not the appellant was actually attending school in the home village some nine or ten years ago or between 1920 and 1922, it being borne in mind that there is no disagreement as to the appellant's attendance at school at Sun Ning City for the past few years.

Furthermore, it will be noted that the appellant's testimony to the effect that he was not attending school in the home village between 1920 and 1922 was not called to the attention of the alleged father. (Tr. of R., pp. 21-24.) In view of this circumstance, the discrepancy lacks substance, especially inasmuch as the alleged father's testimony showed that his memory was not entirely clear as to the schooling of not only the appellant, but also of the appellant's prior landed brother, Chin Fang. He gave the following testimony:

"Q. Do you know what year he (appellant) first started to attend that school in Sun Ning City?

A. I do not remember.

* * * * * * *

Q. At what age did this applicant first start school?

A. He started at either 7 or 8 years of age. I was in this country when he started to go to school.

* * * * * * *

Q. Did this applicant ever attend school with your son Chin Fang?

A. I do not think so.

* * * * * * *

Q. You brought Chin Fang to this country the first time, did you not?

A. Yes.

Q. Was he then attending school at the Ngee Din Ancestral Hall?

A. Yes.

Q. Was this applicant Chin Wing then attending school?

A. Yes, at the same school, Oon Mook. I have forgotten whether my second son ever attended school with the applicant or not, because my second son Chin Fang also attended school in Gong Moon City before he first came to the U. S.

* * * * * * *

Q. You brought him to this country in CR.-11 (1922). Was that the year you have in mind?

A. He did not go to school in CR.-11 (1922). It was in CR.-10 (1921).

* * * * * * *

Q. How do you know this applicant first started to school when he was 7 or 8 years of age?

A. I do not know for certain. I merely guessed at that." (Tr. of R., pp. 22-23.)

In *Wong Bing Pon v. Carr,* 41 Fed. (2d) 604, at page 605, this Court said:

"* * *. The Board of review dismissed from consideration various minor discrepancies, and finally relied upon two (apart from the question of applicant's age) as supporting the finding that the claimed relationship was not established. The first concerned appellant's statement that he last saw his father 2 years ago, when as a matter of fact the father had returned to the United States from China but 6 months prior to appellant's arrival. It is suggested in argument that further

> questioning on this subject would have developed the absence of discrepancy as to this point, because of the differences between the Chinese and the American methods of reckoning time. However this may be, appellant was given no opportunity to explain his answer, in the face of the fact that his entire examination showed him to be extremely vague in his ability to fix dates. *In view of this failure to pursue the subject, it must be held that this discrepancy is without substance.*"

The decision of this Court in *Nagle v. Jin Suey,* 41 Fed. (2d) 522, is especially applicable. There, the facts disclosed several discrepancies in testimony, the most serious of which related to the place where the applicant had attended school in 1920 or about eight years previous to the time that he applied for admission; the alleged father had testified in 1921, in the case of another alleged son, who had then just arrived from China, that the applicant, Jin Suey, had been attending school in Canton City for two or three years and the alleged son, who had arrived from China in 1921, agreed with the alleged father as to Jin Suey's attendance at school at Canton City. When Jin Suey arrived in the United States in 1929 and applied for admission, he (Jin Suey) stated that he had never been to Canton City and that he had always attended school in the home village. The Court, through his honor the late Judge Dietrich, said:

> "Upon the question whether or not applicant had ever attended school in Canton, the testimony given by the three witnesses is out of accord with that given in 1921 by the alleged father and an-

other alleged son, but it is to be borne in mind that upon that subject the father at least never testified from his own knowledge; he was in this country and could only state what he had heard or, as was seemingly the case here, what he assumed to have been done as the result of certain instructions he had given. There is also a seeming discrepancy of a minor character in respect of the schooling of another brother. *But, assuming the discrepancies touching the schools to be real, they sink into insignificance when compared with the many subjects upon which there is agreement, and some discrepancies are to be expected in the testimony of the most truthful witness.* Go Lun v. Nagle (C. C. A.), 22 Fed. (2d) 246; Nagle v. Dong Ming (C. C. A.), 26 Fed. (2d) 438."

It is true that the alleged father, in *Nagle v. Jin Suey,* supra, was testifying from hearsay, but, however, it must be admitted that the prior landed brother, who also agreed with the alleged father and disagreed with the applicant, was testifying from personal knowledge, as this brother, in 1921, had just arrived from China. In any event, the important language in the decision is the following:

> "But, assuming the discrepancies touching the schools to be real, they sink into insignificance when compared with the many subjects upon which there is agreement, and some discrepancies are to be expected in the testimony of the most truthful witnesses."

In *Louis Poy Hok v. Nagle,* 48 Fed. (2d) 753, at page 756, this Court said:

> "The exact details as to the date on which applicant went to a neighboring village to enter a

higher school are of minor importance and failure to agree does not discredit the testimony of the father or of the alleged son. *Upon such particulars discrepancies are bound to occur.*"

2. The Direction of the Burial Ground From the Appellant's Village.

It will not be denied that the appellant and his alleged father agreed that the appellant's mother, who was the first wife of the alleged father, is buried in a hill called Hai Ngai, that the appellant's paternal grandparents are also buried in that hill, that the paternal grandparents are buried in one grave and that there is a stone marking the grave, that the paternal grandparents' grave is 70 or 80 feet from the appellant's mother's grave, that the applicant, with his alleged father, visited the graves during the Ching Ming Festival in 1929 and 1930. (Immigration Record, Exhibit "A," pp. 15, 16, 17, 24, 25, 26, 32, 33.) However it is said that the alleged father testified that the hill called Hai Ngai is located at the south or back of the village whereas the appellant stated that this hill is located at the east or front of the village. This matter is trivial. The hill may have completely surrounded the village or, at least, it may have extended to three sides, namely, the south, east and north, thus, forming a semicircle. No testimony was developed in respect to the description of the hill or as to its extent. (Tr. of R., pp. 27-29.)

In *Hom Chung v. Nagle,* 41 Fed. (2d) 126, at page 128, this Court said:

"* * *. The father and the appellant agree as to so many details that the discrepancies must be

the result of some error or misapprehension in the examination of the witnesses. As to the grandparents' graves, such discrepancies as exist would hardly constitute a fair basis for excluding the appellant. * * *."

It is established by the records of the immigration service that the alleged father was in China at intervals from 1885 to 1889, from 1905 to 1906, from 1910 to 1912, from August, 1920, to September, 1922, and from June, 1928, to July, 1930. (Tr. of R., p. 21.) Concerning such a fact, this Court, in *Hom Chung v. Nagle,* supra, also said:

"* * *. The immigration records show that the father departed from the United States for China on October 24, 1914, and again on June 14, 1923, and returned to the United States from China on December 24, 1915, and on May 19, 1925. As he remained in China during these periods of absence, aggregating about three years, it may be assumed that he testified truthfully to the name of the village in which he lived during his absence, and that he is reasonably familiar with such village which he testifies contains only twelve houses. * * *."

The appellant has testified with such a wealth of detail in respect to the burial places of his mother and grandparents and as to his visit to the burial ground that there cannot be any doubt reasonably entertained as to his knowledge of and familiarity with the facts related by him. He testified as follows:

"Q. Where is your own mother buried?

A. In Hai Ngai Hill, a little over one li (⅓ of mile) east of my village.

Q. Is it directly east of your village?

A. No, it is northeast.

Q. Which way does your village face?

A. North.

Q. Then Hai Ngai Hill is beyond the front of your village. Is that right?

A. Yes.

* * * * * * *

Q. Are your paternal grandparents living?

A. No, both are dead.

Q. What are their names and when did they die?

A. My grandfather was Chin Tom Yet, he died before I was born. I don't know where he died. My grandmother was Louie Shee, died in C. R. 17-5-15 (July 2, 1928) at Lan On Village.

Q. Where was your father at the time your paternal grandmother died?

A. In the United States. My father arrived home from the United States 17 or 18 days after my grandmother's death.

Q. How old was your grandmother at the time of her death?

A. About 70 years old.

Q. What kind of feet did she have?

A. Bound feet.

Q. Where is your paternal grandmother buried at the present time?

A. At Hai Ngai Hill.

Q. Is she buried in the same grave with your paternal grandfather?

A. Yes, under the same mound.

Q. Are your paternal grandparents buried close to your mother in the same hill?

A. No, six or seven jungs apart. (60 or 70 feet.)

Q. Are the graves of your paternal grandparents marked in any manner?

A. Yes, there is a piece of stone about nine inches high and eight inches wide on which is inscribed the name of my paternal grandfather.

Q. Is the name of your paternal grandmother also incribed on that stone?

A. No.

Q. Is the grave of your mother marked in any manner?

A. No.

Q. How can you find it then?

A. I know the location of the grave.

Q. Have you visited those graves every year during Ching Ming Festival?

A. Yes.

Q. While your father was in China on his last trip did he make any visits to those graves during Ching Ming Festival each year?

A. Yes.

Q. Have you ever accompanied him to those graves while he was in China on his last trip?

A. Yes; once during the third month of last year (April, 1929) and once during the third month of this year (April, 1930).

Q. On the occasion in the third month of this year, did you also visit your mother's grave?

A. Yes.

Q. Name all the persons who accompanied your father on that visit which he made to the graves this year?

A. There were only two of us, my father and myself.

Q. Which of these graves did you visit first on that occasion?

A. That of my paternal grandparents.

Q. What time of day did you make the visit?

A. We started from the village about 9 or 10 o'clock in the morning.

Q. On this occasion did your father clean the graves of the paternal grandparents?

A. Yes, we brought along a tool shaped something like a hoe, to loosen dirt.

Q. Did that tool belong to you?

A. Yes."

(Immigration Record, Exhibit "A," pp. 24, 25 and 26.)

The testimony of the alleged father is in agreement with that of the appellant as to all these details. (See testimony of alleged father, Immigration Record, Exhibit "A," pp. 15, 16 and 17.)

In *Young Len Gee v. Nagle,* supra, there was a discrepancy, *inter alia,* involving the location of the burial ground and the graves of the applicant's grandparents and it was held that all of the discrepancies, either separately or collectively, were insufficient to warrant the excluding decision of the immigration authorities.

In *Go Lun v. Nagle,* 22 Fed. (2d) 246, C. C. A. 9th, there was a discrepancy, *inter alia,* involving the location of land owned by the alleged father in the vicinity of the home village and it was held that such a discrepancy was insufficient to warrant the denial of the existence of the claimed relationship.

3. Skylights in the Family Home.

There is no discrepancy urged as to this item. The appellant testified that there is a double skylight in

each bedroom and a single skylight in each kitchen (Tr. of R., p. 30); the alleged father agreed that there is a single skylight in each kitchen, but stated that he did not know how many skylights there were in the bedrooms, giving as a reason: "I did not enter them (bedrooms) while I was in China during my last trip. They are occupied by my daughters-in-law and I am not supposed to enter them." (Tr. of R., p. 31.) The alleged father, therefore, did not deny that there were skylights in the bedrooms and, hence, his testimony cannot be said to be at variance with that of the appellant, who stated that there was a skylight in each bedroom. However, the accuracy of the alleged father's testimony to the effect that he did not enter the bedrooms, which were occupied by his daughters-in-law, is questioned, because, as said by the Secretary of Labor, it appears that one of the bedrooms was not occupied by a daughter-in-law for a period of about six months during the alleged father's last visit to China between 1928 and 1930. Firstly, we submit that the fact that the bedrooms were occupied by his daughters-in-law afforded a legitimate reason for the alleged father not to enter those rooms. Secondly, we submit that even though one of the bedrooms was not occupied by one of the daughters-in-law for a period of about six months, nevertheless, the alleged father may not have had any occasion to enter that room during that period; the room may not have been in use at all.

In any event, there is not a particle of evidence to dispute the alleged father's statement to the effect that he did not enter the bedrooms in question. If we re-

view the alleged father's testimony as to the description of his house, as to the sleeping arrangements over a period of years and as to all other details in respect to the house, it must be conceded that he is testifying from facts, rather than from a prepared story. He testified as follows:

"Q. Describe that house in Lan On Village?

A. The old house was torn down and rebuilt in C. R. 12 (1923) after I came to this country in C. R. 11 (1922). It is a regular five-room one-story brick building with tile floors, with two outside entrances, the large door facing east, a window in each of the bedrooms facing the alleys, provided with wooden shutters and iron bars, no glass panes; a single skylight in each of the kitchens covered with a piece of board. I do not know how many skylights there are in the bedrooms because I did not enter them while I was in China during my last trip. They are occupied by my daughters-in-law and I am not supposed to enter them.

Q. One of those bedrooms was empty for a time before Chin Wing got married.

A. I did not enter that room at all.

Q. How were you able to describe the windows in them?

A. I could see them from the alley.

Q. Are there any lofts in your house?

A. There is a shrine loft in the parlor. I presume there are lofts in the bedrooms, but I do not know how they are arranged.

Q. Is there a bedroom partitioned off in the parlor of your house?

A. There is a wooden partitioned room extending across the back of the parlor.

Q. How did you happen to rebuild your house in 1923?

A. It was too old to live in.

Q. Was it entirely wrecked and taken away?

A. It was all torn down. I presume some of the old material was used.

Q. What kind of floors did the old house have?

A. Dirt floors.

Q. How is your house supplied with water?

A. From a well in front of the fourth row from the tail. That is the only well in the village.

Q. What tablets or other objects were kept in the shrine loft of your new house?

A. There is a wooden tablet with the characters Ging Guey Doy carved on it, which stands for all objects that are ordinarily worshipped, and an incense pot.

Q. What furniture have you in the parlor of your house?

A. One square table, several chairs, that is all.

Q. Have you any photographs of any kind hanging on the walls?

A. No.

Q. Is there a clock of any kind in your parlor?

A. No.

Q. Have you any domestic animals in your home?

A. Yes, we have a black dog; no other animals.

Q. How long have you had that particular black dog?

A. For several years. It was there when I arrived home in China on my last trip.

* * * * * * *

Q. After your arrival in China on your last trip, which room in your house did you occupy?

A. The parlor of my house.

Q. Who occupied that parlor with you?

A. My wife, my son, Chin Gay, and my daughter.

Q. Which room did the family of your son, Chin Tong, live in?

A. The lived in the large door bedroom, or east side bedroom.

Q. Who occupied the small-door bedroom?

A. Chin Wing and his wife.

Q. When you arrived at home, Chin Wing had not yet married, had he?

A. No.

Q. Was that room vacant when you first came home?

A. Yes. When my second son, Chin Fang, was in the village he lived in that room with his family. I understand that this room was vacant from the time his family moved away at the end of C. R. 15 (1926).

* * * * * * *

Q. When Chin Fang and his family made these visits to your house while you were last in China, how long did he stay?

A. For a little over a month each time, that is, at New Year's time. On the first visit, he only stayed several days.

Q. Where did he and his family live when he was at your house on these New Year's visits?

A. In the watch-tower.

Q. How long have you had that watch-tower?

A. It was built in C. R. 15 (1926), started in the first or second month of that year. I do not know how long it took to complete it."

The alleged father having testified in such detail in respect to the family home, we submit that it is obvi-

ous that he is testifying from facts and that it is not reasonable to conclude that his lack of knowledge concerning the skylights in two of the bedrooms of the house is due to the fact that the subject was overlooked in coaching.

In *Hom Chung v. Nagle,* supra, this Court said:

> "* * * The father states that the schoolhouse has one room, but it is not clear that he states only one, in which the teacher sleeps beyond a screen, while the applicant states that the school has five rooms separated by permanent brick walls, and that the teacher slept in a bedroom on the west side. The father states that the roof of the schoolhouse is a flat tile roof; the applicant states the roof is flat above the kitchen, but pointed above the other rooms. Is it reasonable to conclude that the applicant, as the result of coaching, could agree so fully with his alleged father on such a multitude of details concerning the home and family and village, and fail to agree on the number of rooms in the only schoolhouse in the village merely because the subject was overlooked in coaching the witness? It is not clear why one teacher would need five rooms in which to teach, nor why twenty pupils would require so many rooms. The father and the appellant agree as to so many details that the discrepanies must be the result of some error or misapprehension in the examination of the witnesses. * * *."

In *Go Lun v. Nagle,* supra, there was a discrepancy between the applicant and his brother as to the skylights in the schoolhouse, where they had attended school together. The Court said:

"The third discrepancy related to windows and skylights in the school-building, and was even less important than the two already considered. The same may be said of other discrepancies pointed out and referred to by the Board of Special Inquiry."

Young Len Gee v. Nagle, supra;

Hom Chung v. Nagle, supra.

CONCLUSION.

We submit that there was no substantial evidence to justify the immigration authorities in denying the existence of the relationship between the appellant and his alleged father. There are, in fact, only two alleged discrepancies, which are urged by the immigration authorities. These relate to (1) whether or not the appellant was attending school between 1920 and 1922 and (2) the direction from the village of the burial ground. These matters are, of course, immaterial to the issue of relationship, but, nevertheless, as we have endeavored to point out, the discrepancies in respect to the same are not due to deliberate falsehood, but rather to honest mistake. The matter of the alleged father's lack of knowledge as to the existence of skylights in two bedrooms of the family home is immaterial and unimportant and, as we have endeavored to point out, it must be conceded, as a result of a review of the entire testimony of the alleged father in respect to the family home, that he is familiar with the home and that he is testifying as to facts.

On the other hand, the testimony of the witnesses is in substantial agreement as to practically every matter, both material and immaterial, and the case has no inherent weakness—the alleged father was in China at a time to render possible his paternity to the appellant, having been in China from January, 1911, until April, 1912, and the appellant having been born on November 5, 1911; the alleged father has made consistent mention of the appellant on the occasion of his every appearance before the immigration authorities commencing on April 24, 1912, incident to his return to the United States from his trip to China as a result of which trip the appellant was born; the alleged father's prior landed sons, Chin Tong and Chin Fang, have consistently mentioned the appellant as their brother; the appellant produced all available witnesses to testify in his behalf.

It is respectfully asked that the order of the Court below be reversed with direction to issue a writ of habeas corpus.

Dated, San Francisco,
November 18, 1931.

Respectfully submitted,
STEPHEN M. WHITE,
Attorney for Appellant.

No. 6529

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

3

CHIN WING,
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,
Appellee.

BRIEF FOR APPELLEE.

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Subject Index.

Page

Statement of the Case 1

Facts of the Case 1

Argument 2

The executive decision is conclusive 2

Conclusion 23

Index of Authorities Cited

	Pages
Chin Yow v. U. S., 208 U. S. 8	3
Hom Dong Wah v. Weedin, 24 Fed. (2d) 774	7, 12
Lee How Ping v. Nagle (C. C. A. 9) 36 Fed. (2d) 582	11
Lee Lung v. Patterson, 186 U. S. 168, at 176	5
Louie Poy Hok v. Nagle, 48 Fed. (2d) 753	18
Moy Chee Chong v. Weedin (C. C. A. 9), 28 Fed. (2d) 263	13
Nagle v. Jin Suey, 41 Fed. (2d) 522	17
Quock Ting v. U. S., 140 U. S. 417, at 420	6
Siu Say v. Nagle, 295 Fed. 676	7
Tang Tun v. Edsell, 223 U. S. 673, at 681	5
Tillinghast v. Flynn ex rel Shin King (C. C. A. 1), 38 Fed. (2d) 5	2
Tisi v. Tod, 264 U. S. 131	4
Tulsidas v. Insular Collector of Customs, 262 U. S. 258 at 265	7, 10
U. S. v. Ju Toy, 198 U. S. 253, at 262	3
8 *U. S. C. A.*, Sec. 153, 174	3
8 *U. S. C. A.*, Sec. 221	2
Weedin v. Lee Gock Doo (C. C. A. 9), 41 Fed. (2d) 129	14
Weedin v. Yip Kim Wing (C. C. A. 9), 41 Fed. (2d) 665	13
Wong Bing Pon v. Carr, 41 Fed. (2d) 604	16
Wong Foo Gwong v. Carr (C. C. A. 9), 50 Fed. (2d) 360 at 362	2
Wong Sun Ying v. Weedin, 50 Fed. (2d) 377	19
Yee Chun v. Nagle (C. C. A. 9), 35 Fed. (2d) 839	11

No. 6529

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHIN WING,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE

This appeal is from an order of the District Court for the Northern District of California, denying appellant's petition for a Writ of Habeas Corpus (Tr. pp. 40 and 43).

FACTS OF THE CASE.

Appellant is a male Chinese, twenty years of age, who sought admission into the United States as the foreign born son of Chin Sung, an American citizen. His application for admission was denied by a Board

of Special Inquiry on the ground that he had failed to establish satisfactorily that he is the son of Chin Sung (Tr. pp. 32 to 39, inclusive). That decision was affirmed on appeal by the Secretary of Labor (Respondent's Exhibit "A", pp. 69, 68).

ARGUMENT.

THE EXECUTIVE DECISION IS FINAL.

This is another of the great number of cases now on the docket of this Court, involving solely a question of fact which has been already passed upon by the two statutory tribunals to which the issue is committed for final determination, and the action of said tribunals has received the careful scrutiny of the Court below on habeas corpus proceedings, as well as upon a motion for rehearing in said habeas corpus proceedings.

Appellant makes an exhaustive analysis of the evidence before the executive officers, seeks to argue that the burden of proof is on the appellee, and his ultimate contention is that the executive tribunals should have decided in his favor.

At the outset we desire to point out that the burden of proof was on the applicant.

8 U. S. C. A., sec. 221;

Wong Foo Gwong v. Carr, (C. C. A. 9) 50 F. (2d) 360 at 362;

Tillinghast v. Flynn ex rel. Chin King, (C. C. A. 1) 38 F. (2d) 5.

Furthermore, Congress has expressly provided that the decision of the Board of Special Inquiry and of the Secretary of Labor "shall be final".

8 U. S. C. A. secs. 153, 174;
United States v. Ju Toy, 198 U. S. 253 at 262.

Appellant stresses the evidence which he claims is favorable to him. We submit that the question of the weight of that evidence is committed to the executive tribunals and is not open to consideration by this Court.

The leading case of

Chin Yow v. United States, 208 U. S. 8,

has definitely laid down the limits of the jurisdiction of the Court in these matters. In that case the Court said:

> "If the petitioner was not denied a fair opportunity to *produce* the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. *Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all.* It must not be supposed that the mere allegation of the facts opens the merits of the case, *whether those facts are proved or not.* And, by way of caution, we may add that jurisdiction would *not* be established simply by proving that the Commissioner and the Department of Commerce and Labor *did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced.*"

And in conclusion, the Court said:

> "But unless and until it is proved to the satisfaction of the Judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

We submit that in the case at bar appellant's argument is simply an attempt to prove that the decision was wrong.

We turn to the case of

> *Tisi v. Tod,* 264 U. S. 131, decided by the Supreme Court in 1924.

In that case the doctrine of *Chin Yow v. United States* was reaffirmed and clarified. We also point out that in *Tisi v. Tod* the Government was seeking to expel an alien resident, on the ground that he was of a class subject to deportation under the immigration laws. Hence in that case the burden was on the Government, and the doctrine of that case is *a fortiori* applicable in an exclusion case where the burden is on the person seeking entry.

In the case of *Tisi v. Tod,* the contention was that there was no evidence to support the executive finding. The Court said:

> *"We do not discuss the evidence;* because the correctness of the judgment of the lower court *is not to be determined by enquiring whether the conclusion drawn by the Secretary of Labor from the*

evidence was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found.

"The denial of a fair hearing is not established by proving merely that the decision was wrong. Chin Yow v. United States, 208 U. S. 8, 13. This is equally true *whether the error consists in deciding wrongly that evidence introduced constituted legal evidence of the fact* or *in drawing a wrong inference* from the evidence."

In conclusion the Court said:

"* * * mere error, *even if it consists in finding an essential fact without adequate supporting evidence,* is not a denial of due process of law."

Appellant places great reliance on the points in the evidence which he claims are favorable to him.

"* * * but this, with all the other evidence in the case, was for the consideration of the officers to whom Congress had confided the matter for final decision."

Tang Tun v. Edsell, 223 U. S. 673, at 681.

"We cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence * * *".

Lee Lung v. Patterson, 186 U. S. 168, at 176.

Regarding previous assertions of appellant's alleged relatives that there was in the family such a son as

appellant claims to be, it is obvious that the question before the executive tribunals involved not only whether the alleged father in fact had such a son, but also whether this particular individual is that son. Upon this question, certainly the weight of the declarations was for the tribunals to whom the matter is committed for final determination.

The rejection of the appellant's claim is primarily based upon certain conflicts and improbabilities in the testimony, which led the Board to believe that the witnesses were testifying from a prepared story, the Board also pointing out that when asked certain questions the witnesses became evasive and indefinite in their answers (Tr. p. 38).

Of course, the tribunal which saw and heard the witnesses properly took such matters into consideration, even though the naked record cannot adequately reflect these acid tests of credibility. Such indicia are vital in determining the facts and in weighing the evidence offered to establsh the claim.

In

Quock Ting v. United States, 140 U. S. 417, at 420,

the Supreme Court said:

> "He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of

> testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

That statement is particularly apt in these Chinese exclusion cases, because as this Court itself has said:

> "In cases of this character, experience has demonstrated that the testimony of the parties in interest as to the mere fact of the relationship cannot be safely accepted or relied upon. Resort is, therefore, had to collateral facts for corroboration or the reverse."
>
> *Hom Dong Wah v. Weedin,* 24 Fed. (2d) 774; *Siu Say v. Nagle,* 295 Fed. 676.

The Supreme Court in

> *Tulsidas v. Insular Collector of Customs,* 262 U. S. 258, at page 265,

pointed out that the judgment of the executive officers is based on their knowledge of the conditions obtaining, on their contact with the applicant, and on their estimate of the applicant's claims, and *"we should not view the spoken word * * * separate from that contact and that estimate".*

We proceed to analyze the conflicts and the adverse features in the testimony.

Appellant's alleged brother was last in China from December, 1917 to July, 1919 (Tr. p. 21). In October, 1922, he appeared as a witness for another alleged brother, and at that time he testified that while he was in China (from December, 1917 to July, 1919) his brother, Chin Wing, whom this appellant claims to be, was "going to school" (Tr. p. 24).

Appellant's alleged father was at home in China from August, 1920, to September, 1922, and from June, 1928, until he brought appellant to the United States (Tr. pp. 21 and 33). These are the only trips made by the alleged father to China since appellant's infancy. He testified that while he was at home in China from August, 1920, to September, 1922, appellant was actually attending school in the home village, and that appellant attended the school in the home village during that entire period of two years (Tr. pp. 23 and 24).

Hence the testimony of members of appellant's alleged brother as early as 1922 is that the boy whom appellant claims to be was going to school during 1918 and 1919, and the testimony of the alleged father, purporting to be based on actual knowledge, is that the said alleged son was attending school in the home village during all of the alleged father's stay there from August, 1920 to September, 1922.

According to appellant's witnesses, then, we have the boy he claims to be attending school in 1918, 1919, 1920, 1921 and 1922 in the home village. This particu-

lar testimony relates only to periods when the respective witnesses were actually at their home in China.

Let us compare appellant's testimony:

Appellant testified that he *first started to attend school in 1926,* that this was not in the home village but in Sun Ning City, *that he never attended any other school,* that he has only been attending school *four years altogether,* that he first started to attend school *at the age of sixteen years,* and that *he never at any time attended school in the home village* (Tr. 25, 26).

Appellant was then advised that his alleged father stated that he had attended another school prior to attending the school at Sun Ning City. Appellant then stated that he attended school *"a few days"* at the home village *"about five years ago"* (which would be about 1925) (Tr. pp. 25 and 26). In answer to a question as to why he did not attend school, except for a few days, until he was sixteen years old he said "my mother told me to begin school at the age of sixteen" (Tr. p. 27).

Just such a point as this, we submit, is extremely vital in determining, in this particular class of cases, the identity of the individual who is seeking to come in as the foreign born son of an American citizen. The situation is this: Appellant claims to be Chin Wing. Testimony given eight years ago by Chin Wing's brother, who had been at home from December, 1917 to July, 1919, was that Chin Wing was going to school

during that period. Testimony of the alleged father is that, while he is uncertain as to Chin Wing's schooling when he, the alleged father, was in the United States, he does know that Chin Wing was going to school in the home village from August, 1920 to September, 1922. He, the alleged father, was at home during that period.

Hence taking only the testimony which purports to be based on first hand knowledge, it is established that Chin Wing was attending school during the years from 1918 to 1922. This appellant, however, testified positively that, except for a few days about five years ago, he never attended any school until 1926. His own testimony on this point is substantial evidence that he is not Chin Wing, the reputed son of Chin Sung. It is just such matters as these which afford a practical test of the truth of the appellant's claim and of the veracity of the evidence offered to identify him.

In

Tulsidas v. Insular Collector of Customs, supra,

the Supreme Court pointed out that the law, in administration of its policy, has appointed officers to determine these cases "on practical considerations", and that the Court should

> "leave the administration of the law where the law intends it should be left; to the atten n of officers made alert to attempts at evasion of it and instructed by experience of the fabrications which will be made to accomplish evasion."

Such disagreement as we have in this case relative to school attendance of the applicant has been frequently held to be material to these administrative inquiries.

In

Lee How Ping v. Nagle, (C. C. A. 9), 36 Fed. (2d) 582,

the applicant had no recollection of having attended school in the home village for a period of nearly two years with an alleged brother at the time the applicant was about seven years of age, although the testimony of the applicant's witnesses was that the applicant had attended school in the home village since the age of about six years. This Court said:

> "These discrepancies are of the sort that tend to show that the applicant was not a member of Lee On's family as claimed, and therefore the decision of the Immigration authorities having been arrived at by due process of law could not be disturbed."

In

Yee Chun v. Nagle, (C. C. A. 9), 35 Fed. (2d) 839,

the applicant disagreed with his witnesses regarding which building in the village housed the school which he claimed to have attended. His Honor Judge Rudkin said:

> "The place where the appellant and his alleged prior landed brother attended school was neces-

> sarily within the personal knowledge of all three witnesses, and the discrepancy in their testimony in that regard is not easily accounted for. At least the finding of the board that the relationship was not established to its satisfaction is not without support in the testimony."

Certainly, if a disagreement as to the building in which the applicant attended school in the home village is sufficient to sustain the excluding decision, there can be no doubt that flat disagreement as to whether he ever went to school in the home village at all is sufficient.

In

> *Hom Dong Wah v. Weedin,* (C. C. A. 9), 24 Fed. (2d) 774,

Circuit Judge Rudkin stated a similar disagreement, as follows:

> "The appellant testified that he attended school at another village up to within two or three days of his departure from China, whereas the alleged father testified that the appellant had not attended school for more than a month before leaving China",

and as to the effect of discrepancies of that character, Judge Rudkin said:

> "Viewed in this light, we are not prepared to say that discrepancies such as those found here, relating as they do to the home life and surroundings of the parties, are not sufficient to raise a substantial doubt as to the relationship claimed."

In

Moy Chee Chong v. Weedin, (C. C. A. 9), 28 Fed. (2d) 263,

the alleged brother of the applicant testified that he had left school four years before he came to the United States, whereas the applicant testified that this alleged brother had come to the United States as soon as he left school. The Court said:

> "It is not conceivable that the appellant could have been ignorant of the fact that his alleged brother had been out of school for four years before coming to the United States, and that he had been working in the rice fields."

In

Weedin v. Yip Kim Wing, (C. C. A. 9), 41 Fed. (2d) 665,

this Court said:

> "Appellee further states that the only school he ever attended was in the Ung On village, while the father claims that he never went to school there and always went to school in the Hong Mee village and that he was attending school there when the alleged father arrived from China, in January, 1927. The appellee and the alleged father also differ as to the name of the teacher. The alleged father also testifies that the mother wrote him that the applicant had attended school in Sai How village for one year.
>
> "In view of these discrepancies in the testimony relied upon by the applicant we cannot say that

the applicant was denied a fair hearing on the question of his right to enter the United States."

In

Weedin v. Lee Gock Doo, (C. C. A. 9), 41 Fed. (2d) 129,

this Court said:

"In 1926, applicant testified that he attended school in his home village, Ping On, for two years, with his alleged brother, Lee Gock Din, before going to Foo San village to school. At the last hearing both applicant and his father testified that applicant had never attended any other school than the one in Foo San village."

* * * * * *

"On this record, despite the substantial agreement in the testimony at the last hearing taken alone, it cannot be said that the conclusion reached by the Board of Special Inquiry was without foundation, and hence arbitrary and capricious. *Moy Chee Chong v. Weedin,* 28 Fed. (2d) 263. The unexplained discrepancies in the 1926 record, and between that record and the one at the last hearing, *are as to matters in which a reasonable degree of agreement would be expected were the persons involved members of the same family. Chin Share Nging v. Nagle,* 27 Fed. (2d) 848."

Appellant seeks to argue that the alleged father may have been confused as to the school attendance of Chin Wing because he has four other children whose school experiences have been varied. However, the alleged

father's testimony relates to the time he was at home in China from August, 1920 to September 1922. At that time the alleged father, according to his testimony, only had two children in China, viz., Chin Wing and Chin Fang. The eldest son had come to the United States many years before that time (Tr. p. 21), and the two alleged offspring of the second marriage were not born until January, 1922 and September, 1929, respectively (Respondent's Exhibit "A", p. 16).

It is obvious, therefore, that appellant's suggestion in this regard is without merit. Furthermore, the appellant is in direct conflict, not only with the alleged father, but with the alleged brother, who testified that Chin Wing was attending school when he himself was in China from December, 1917 to July, 1919, whereas appellant claims that he went to school for the first time in 1926, except for a few days' attendance about 1925.

Appellant attempts to show that the alleged father's memory was not entirely clear on this point. However, appellant is very careful to quote only that portion of the alleged father's testimony regarding the applicant's schooling at times when the alleged father was not in China. He refrains from quoting the vital portion of the alleged father's testimony, which is that pertaining to the particular period when the alleged father was there, viz.:

> "Q. *During your visits* that you made to China, was this applicant actually attending school in the home village?

A. Yes, except on my last trip, when he was attending school at Sun Ning City.

Q. You were in China on your second last trip from 1920 to 1922. During that entire period of time did the applicant attend school in the home village?

A. Yes.

Q. At that time was there only one school held in your village?

A. Yes, just one.

Q. And that was the Oon Mook School?

A. Yes.

Q. Did the applicant have a summer vacation in that school?

A. Yes." (Tr. pp. 23 and 24.)

Also, the testimony given by the alleged brother in *1922,* viz.:

"Q. What was your brother Chin Wing doing when you were last in China?

A. Going to school." (Tr. p. 24.)

The cases appellant cites are not in point.

In

Wong Bing Pon v. Carr, 41 Fed. (2d) 604,

which he cites, there was merely an apparent discrepancy as to dates, and the examination was not pursued to determine whether there was actually a disagreement in substance.

In

Nagle v. Jin Suey, 41 Fed. (2d) 522,

all the witnesses agreed as to the appellee's schooling, but about eight years earlier the alleged father had stated that his son was then attending school in Canton, a fact of which he could not personally know, because he had not been in China for some time. The Court expressly said:

> "The father at least *never testified from his own knowledge;* he was in this country and could only state what he had heard or, as was seemingly the case here, what he assumed to have been done as the result of certain instructions he had given."

We would invite attention to the fact that Jin Suey was discharged in the District Court by the same Judge who denied appellant's petition in the Court below.

We again wish to point out that in the case at bar we are not concerned with the alleged father's knowledge or lack of knowledge of the applicant's schooling at any time when the alleged father was in the United States. This repetition is made because of appellant's attempt to limit the matter to that phase. What we actually have is direct testimony of the alleged brother on one occasion, and of the alleged father on another, pertaining respectively to times when each was at home in China, and purporting to be based on personal knowledge.

In

Louie Poy Hok v. Nagle, 48 Fed. (2d) 753,

the Court expressly said that the discrepancy referred to "the exact details as to the date" on which the applicant went to a neighboring village to enter a school there. That case, likewise, is obviously not in point.

The second adverse feature pointed out by the executive tribunals relates to the location of the grave of appellant's alleged mother.

The alleged father testified that the grave of his first wife (appellant's alleged mother) is a short distance "back or south" of the home village (Tr. p. 28). Later in the course of his examination he repeated that it is three or four lis (from one to one and one-third miles) back of the village (Tr. p. 29). It is also claimed that he and appellant visited the grave together as recently as April, 1929 and April, 1930 (Tr. pp. 28 and 29; Respondent's Exhibit "A", p. 26). The alleged father's testimony in 1922 is to the same effect, viz., that his first wife's grave is "just a little back of our village" (Respondent's Exhibit "D", p. 16).

Although appellant's alleged mother is said to have died in 1919 (Respondent's Exhibit "A", p. 24), and although appellant claims to have visited her grave every year (Id. p. 26), appellant testified that her grave is in *front* of the village, he giving the direction of the grave as northeast from the village (Tr. p. 29).

On this point the Secretary of Labor said:

> "If this were merely a disagreement as to directions described by reference to the cardinal points of the compass, it might not be held to be definite and serious, but it is made definite by the fact that the alleged father places the burial place behind the village, whereas the applicant places it in front." (Respondent's Exhibit "A", p. 68).

As additional proof that this is no mere confusion in the minds of the witnesses, we would point out that both the alleged father and appellant agree that the home village faces north (Respondent's Exhibit "D", p. 14; Tr. p. 29).

In

Wong Sun Ying v. Weedin, 50 Fed. (2d) 377,

this Court said:

> "If the subject is psychologically important, and if it concerns the intimate family life, then a discrepancy with reference to it is inconsistent with the alleged relationship. This is the essence of the test used by this Court in the case of Weedin v. Yee Wing Soon, 48 Fed. (2d) 37."

Can anything be of greater psychological importance to the mind of a twenty year old youth, or can anything be more closely related to the intimate family life, than the location of the nearby grave of the youth's own mother? In the case at bar, it is claimed by appellant that he made ceremonial visits to that grave every

year. Is it reasonable to suppose that in such circumstances he would not know whether the grave is in front of the village or back of the village?

Appellant suggests in his brief that the hill in which the alleged mother is buried may extend all around three sides of the village, forming a semi-circle. But, in 1922 the alleged father testified that it was back of the village, and he now testifies that it is back of the village. This attempted reconciliation of the conflict is most unconvincing.

There was no such conflict in the cases which appellant cites. In those cases there were merely minor discrepancies relative to the grave of more distant ancestors.

Certainly, the Board of Special Inquiry and the Secretary of Labor were not arbitrary in considering that if appellant were the person he claims to be there should be no such disagreement on a matter so intimately related to the life of a Chinese family.

The third adverse feature arose in the questioning of the parties relative to the description of their alleged home in China. The applicant testified that two of the rooms in that five room house are bedrooms, and that there is a double skylight in each bedroom (Tr. p. 30). In order to test the accuracy of his description of the house in which he claims to have always lived, the Board questioned the alleged father as to this matter. The alleged father said:

"I do not know how many skylights there are in the bedrooms because *I did not enter them while I was in China during my last trip.*" (Tr. p. 31.)

It will be recalled that the alleged father was last in China for a period of two years immediately prior to the hearing, he having accompanied the appellant to this country. Attention is also invited to the testimony of the alleged father that during that entire period "I had no occupation, just stayed around home" (Tr. p. 27).

The Board of Special Inquiry and the Secretary of Labor were impressed with the inherent improbability of the testimony that the alleged father, during the entire two years spent at his five room residence, never entered two of those five rooms. Taking this in connection with other significant features of the examination, the Board was led to the opinion that the witnesses were testifying from a prepared story, and that the alleged father, in this respect, was evading the questions for fear of giving some information on a point relative to which appellant might not be prepared, and with which appellant's testimony might disagree (Tr. p. 38).

Let us examine the purported explanation attempted to be made for this surprising statement of the alleged father.

It is stated that the reason the alleged father did not enter either of the two bedrooms during the two

year visit, from which he had just returned, was that these bedrooms were occupied by his daughters-in-law. Does that statement jibe with the testimony? An examination of the testimony conclusively demonstrates that it does not.

The testimony is that appellant did not marry until January 16, 1929 (Tr. p. 32). The alleged father arrived at home about July, 1928 (Tr. p. 27). He testified that when he reached home the small door bedroom was vacant (Tr. p. 31), but he still insisted that during the six months from his arrival until the marriage of appellant, he did not enter that room at all (Tr. p. 31). His testimony is that his second son, Chin Fang, and the latter's family moved away in 1926 (Tr. p. 31), and it appears that since that time they have been living in Canton City (Respondent's Exhibit "A", pp. 16 and 17), and only made two visits to the family home during the alleged father's last visit to China, the first being six or seven days after the alleged father's arrival, on which occasion they only stayed for two or three days, and the second being at New Year's, at the end of 1928 (Id. pp. 18 and 19).

It is obvious, therefore, that according to the testimony one of the two bedrooms in the five room house was vacant for at least six months after the alleged father reached home about the middle of 1928, and this is not disputed. Even if there were a reason for not entering either of the two rooms for the balance of his visit, certainly it is highly improbable that one who has just returned to his home in a distant land after

an absence of six years would not enter one of the bedrooms of that five room house during the first six months of his visit there, it being admittedly unoccupied during that period.

Such a statement would subject the credulity of any tribunal to a severe strain.

Coupling that extremely unconvincing testimony with the other matters which we have discussed above, and with the fact that the Board was impressed with the evasive and indefinite testimony in certain respects, we submit that the rejection of appellant's claim by the tribunals, to which the matter is committed by the statute for final determination, and which saw and heard the witnesses, is justifiable and cannot be said to be arbitrary.

CONCLUSION.

Appellant's claim is that he is Chin Wing, the reputed son of Chin Sung. All the previous testimony of the members of the family, covering the periods when the witnesses were actually at home in China, is that Chin Wing was attending school in 1918, 1919, 1920, 1921, and 1922. Appellant positively denied that he ever attended school before 1926. He also positively denied that he ever went to school in the home village. After being informed that the alleged father disagreed with him, he stated that he went to school in the home village for "a few days", and that this was "about five

years ago'' (which would be about 1925). This substantially discredits appellant's claim that he is Chin Wing, the son of Chin Sung. Furthermore, his own testimony contradicts all the other testimony of record relative to the location of the grave of his alleged mother, which he claims to have visited every year. The Board was impressed with the fact that on certain particulars the witnesses were evasive and indefinite in their testimony, indicating a prepared story. This is particularly borne out by the highly improbable claim of the alleged father that during the two years of the visit to China, from which he had just returned, he did not enter two of the five rooms of his house. Clearly there was substantial reason for any tribunal to reject the claim.

We submit that the order of the Court below should be affirmed.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney,

H. A. VAN DER ZEE,
Asst. United States Attorney,
Attorneys for Appellee.

No. 6533

United States
Circuit Court of Appeals
For the Ninth Circuit.

ANNIE JENSEN and CHRISTIAN JENSEN,
Appellants,

vs.

T. J. SPARKES, Trustee in Bankruptcy of O. STANLEY DRESHER, Bankrupt,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Assignment of Error	25
Certificate of Clerk U. S. District Court to Transcript of Record	31
Citation on Appeal	32
Names and Addresses of Attorneys of Record	1
Order Allowing Appeal and Directing That No Bond on Appeal be Required	28
Order of United States District Judge on Review from Referee	1
Petition for Appeal	24
Praecipe for Transcript of Record on Appeal	30
Statement of the Case	3
Stipulation That No Cost Bond on Appeal be Filed	27

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

STOCKTON and PERRY, Security Building, Phoenix, Arizona,
Attorneys for Appellant.

WALTER J. THALHEIMER, Luhrs Building, Phoenix, Arizona,
Attorney for Appellee. [3*]

In the District Court of the United States, for the Federal District of Arizona.

IN BANKRUPTCY—No. B.-557—PHOENIX.

In the Matter of O. STANLEY DRESHER, Bankrupt.

ORDER OF UNITED STATES DISTRICT JUDGE ON REVIEW FROM REFEREE.

The petition to review Referee's order in the above entitled and numbered bankruptcy matter came on regularly for hearing before the Honorable FRED C. JACOBS, United States District Judge, on May 25th, 1931, at which time the petitioners were represented by their attorneys, Stockton & Perry, and the Trustee in Bankruptcy was represented by his attorney, Walter J. Thalheimer.

After argument of counsel, the Court, being fully advised in the premises,—

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*Page-number appearing at the foot of page of original certified Transcript of Record.

IT IS ORDERED that the order of the Referee, dated April 11th, 1931, be modified so as to read as modified as follows:

At Phoenix, Arizona, in said District, on this 11th day of April, 1931, before Honorable R. W. SMITH, Referee in Bankruptcy.

IT IS ORDERED that the sum of Fifteen Hundred Dollars ($1500.00) paid by the bankrupt on November 30, 1928, to lessor, predecessor in interest to claimant, was an advancement for the security of the lessor, title to which remained in the bankrupt, and, on his bankruptcy, title vested in the trustee; that interest on said sum of Fifteen Hundred Dollars ($1500.00) from November 30, 1928, to July 18, 1930, at the rate of ten per cent per annum, is due from claimant to the bankrupt estate; that the amount of said interest is Two Hundred Thirty-two and 80/100 [4] Dollars ($232.80) less One Hundred Eighty-seven and 50/100 Dollars ($187.50) paid by claimant prior to bankruptcy, or forty-five and 30/100 Dollars ($45.30).

IT IS ORDERED that from said sum of Fifteen Hundred Forty-five and 30/100 Dollars ($1545.30), rental in the sum of Six Hundred Twenty-one Dollars ($621.00) due claimant for rent accrued prior to bankruptcy be offset and, in addition thereto, the further sum of Four Hundred Twenty-nine Dollars ($429.00), which sum is hereby allowed for the use and occupancy of the leased premises by the Trustee from July 18th, 1930, to October 1st, 1930, be also offset.

IT IS ORDERED that Annie Jensen and Christian Jensen pay to the Trustee in Bankruptcy of the

above-named bankrupt Four Hundred Ninety-five and 30/100 ($495.30) Dollars, the amount herein found due from claimant to said bankrupt estate.

Dated this 11th day of April, 1931.

R. W. SMITH,
Referee in Bankruptcy.

Service of the foregoing and receipt of copy is acknowledged this 21st day of April, 1931.

STOCKTON and PERRY,
Attorneys for Claimants.

And as so modified, the said order of the Referee is hereby approved and affirmed.

An exception is allowed the Trustee and an exception is also allowed petitioners.

Done in open court this the twenty-fifth day of May, 1931.

F. C. JACOBS,
United States District Judge.

Filed May 27, 1931. [5]

[Title of Court and Cause.]

STATEMENT OF THE CASE.

With the approval of the above-entitled court hereunder endorsed, the parties in interest prepare and sign this statement of the case and show how the questions arose and were decided in the District Court.

The facts are stated in a stipulation prepared and signed by the parties, which is in the words and figures following, to wit:

"IT IS HEREBY STIPULATED by and between respective counsel of Annie Jensen and Christian Jensen, husband and wife, claimants herein, and T. J. Sparkes, Trustee in Bankruptcy of the estate of O. Stanley Dresher, bankrupt, that the following are facts which need not be proved except by this stipulation, and that the rights of the parties may be adjudicated upon such facts:

1. That O. Stanley Dresher filed a petition in bankruptcy in the above named court on July 18, 1930, and that he was thereafter on July 21, 1930, duly adjudged a bankrupt. That on August 21, 1930, T. J. Sparkes was duly qualified as trustee in bankruptcy of said bankrupt.

2. That Albert Jensen of Miami, Arizona, as lessor, entered into a lease in writing with O. Stanley Dresher on the 30th day of November, 1928, a true copy of which lease is set forth in full in the amended proof of secured debt filed herein on the 23rd day of January, 1931.

3. That the building mentioned and described in said lease was completed and possession thereof was given and the term of the lease began March 1, 1929. That bankrupt continued to occupy said building under said lease to July 18, 1930, the date upon which his petition in bankruptcy was filed.

4. That on November 30, 1928, O. Stanley Dresher, lessee, paid to the lessor, pursuant to the terms of said lease, Fifteen Hundred Dollars ($1500.00).

5. That the said O. Stanley Dresher, the above named bankrupt, failed to pay any rent to the said

[6] Annie Jensen and Christian Jensen, as provided by the terms of said lease, for the months of April, May, June and the first seventeen days of July, 1930, such rental amounting to the sum of $621.00.

6. That no note has been received or given for said rent, nor for any part thereof, nor has any judgment been rendered thereon; that said Annie Jensen and Christian Jensen are to pay, and are ready, able and willing to pay said bankrupt and/or his trustee in bankruptcy, interest as provided by the terms of said lease upon said sum of Fifteen Hundred Dollars ($1500.00) paid as in said lease provided and herein recited in the manner and at the time specified in said lease, and said Annie Jensen and Christian Jensen hereby offer to so do.

7. That prior to bankruptcy Annie Jensen and Christian Jensen paid to bankrupt on account of interest on the said sum of Fifteen Hundred Dollars ($1500.00) hereinbefore mentioned and in the lease specified, the sum of One Hundred Eighty-seven and 50/100 Dollars.

8. That the trustee in bankruptcy of the above named bankrupt abandoned the lease described herein and vacated the premises on the 24th day of September, 1930; that said bankrupt failed to make any payments accruing under said lease subsequent to the date of bankruptcy and the said trustee in bankruptcy has paid no sum to claimants on account of rent or for the use and occupancy of the premises described in said lease by the trustee after the filing of the petition in bankruptcy.

9. That Annie Jensen does not have any other or additional security for the payment of the debt mentioned in said amended proof of secured debt.

10. That on or prior to October 1, 1930, Annie Jensen leased the premises described in said lease to Carroll Chevrolet Motor Company upon a written lease beginning October 1, 1930, and extending for a period of five years and at a rental of One Hundred Dollars ($100.00) per month for the first four months, One Hundred Twenty-five Dollars ($125.00) per month for the next five months and the balance of the term of the lease at One Hundred Fifty Dollars ($150.00) per month. That said last mentioned lease was made upon the most favorable terms that Annie Jensen could obtain after using due diligence.

11. That on May 2, 1929, Albert Jensen of Miami, Arizona, lessor in said lease named, sold and transferred to Annie Jensen the rent theretofore accruing and to thereafter accrue under said lease, and on the same date conveyed the real property described in the said lease to Annie Jensen and said Annie Jensen is now the owner of said real property and by virtue of said transfer and conveyance she is entitled to the rent accruing prior to bankruptcy and to compensation for the use and occupancy described in the lease by the trustee after the date of the filing of the petition and if any obligation existed on Albert Jensen by virtue of the payment of said [7] sum of Fifteen Hundred Dollars ($1500.00) pursuant to the terms of said lease, that obligation has been assumed by and is now the obligation of Annie Jensen.

12. That subsequent to the trustee's qualification, he demanded of Annie Jensen the payment and return to said trustee of the sum of Fifteen Hundred Dollars ($1500.00) paid by lessee to lessor in accordance with the terms of said lease. That Annie Jensen refused to comply with said demand in whole or in part and no sum has been paid by Annie Jensen or anyone in her behalf to said trustee.

13. It is further stipulated and agreed by and between the respective parties hereto, acting through their attorneys, that questions of law involved herein may be submitted upon briefs; that the claimants shall have ten (10) days from the date hereof in which to file their brief; that the trustee in bankruptcy shall have ten (10) days from the filing of the claimants' brief in which to reply to same; and the claimants shall have five (5) days from the filing of the trustee's brief in which to reply thereto.

Dated March 20th, 1931.

WALTER J. THALHEIMER,
Attorney for Trustee.
STOCKTON & PERRY,
Attorneys for Claimants."

The questions arose upon the filing by Annie Jensen and Christian Jensen, husband and wife, on the 23d day of January, 1931, with the Referee in charge of the above bankruptcy proceedings, an amended proof of secured debt in the words and figures following, to wit:

"At Miami, Arizona, in the District of Arizona, on the 19th day of January, A. D. 1931, came Annie

Jensen and Christian Jensen, husband and wife, of Miami, Arizona, in the County of Gila, in said District of Arizona, and made oath and say:

That O. Stanley Dresher, the person by whom a petition for adjudication in bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said Annie Jensen, deponent, in the sum of $621.00; that the consideration of said debt is as follows:

Rent for April, May, June and the first seventeen days of July, 1930, at the rate of $175.00 per month, accrued prior to July 18, 1930, the date of bankruptcy herein, under and pursuant to a lease in writing, which is in the words and figures following, to wit: [8]

'AGREEMENT OF LEASE.

THIS INDENTURE made between ALBERT JENSEN, of Miami, Arizona, of the first part, lessor, and O. STANLEY DRESHER, of Superior, Arizona, of the second part, lessee.

1.

WITNESSETH: That the first party, in consideration of the covenants of the second party, hereinafter set forth, does by these presents let, lease and demise, and has let, leased and demised to and unto the second party the following described property, namely:

> Lots eighty-one (81) and eighty-two (82), of Block Sixteen (16), of the original townsite of SUPERIOR, Pinal County, Arizona, according to the STEWART map thereof.

2.

TO HAVE AND TO HOLD the same to and unto the second party for the period of five years.

a. The said five year period shall begin to run on the date of completion of the building to be constructed on said premises by and at the expense of first party, hereinafter mentioned; or,

b. In the event that second party occupies the said building prior to completion thereof, then the said five year period shall begin as of the date of such occupancy.

c. Provided, however, that the said five year period shall begin not later than six months from the date hereof.

d. To obviate any future confusion as to the date of beginning of the said five year period, when occupancy of the building shall start, the parties hereto shall sign a properly identified written statement of the date of beginning of the five year period, duly acknowledge the same, and a complete copy thereof shall be furnished to each party hereto.

3.

THE SECOND PARTY, in consideration of the leasing of the premises as above set forth, covenants and agrees with the first party to pay to the first party, as rent for the same, the MONTHLY sum of ONE HUNDRED and SEVENTY FIVE ($175.00) DOLLARS, but this is a lease for five years, and not from month to month, and said rent shall be paid in the manner following: [9]

a. The monthly payments of $175.00 shall be paid in advance on the first day of each month.

b. In event that occupancy should be started other than on the first day of a month, then the first payment shall be paid in advance, and is to be computed on the basis of $175.00 per month from date of beginning of occupancy to the last day of the month in which occupancy begins.

c. On the date of the execution and acknowledgment of this lease by the respective parties, the SECOND PARTY is to and shall pay to first party the sum of ONE THOUSAND FIVE HUNDRED ($1,500.00) DOLLARS, being, approximately, for the last eight and four-sevenths months of the five year period covered by the lease.

d. The first party is to and shall pay to second party interest on said FIFTEEN HUNDRED ($1500.00) DOLLARS at the rate of ten-percent per annum, said interest payable annually, and said interest shall begin to run from the date the said $1,500.00 is paid to first party by second party, and shall continue in effect, *pro tanto,* until the entire $1,500.00 shall have been earned and absorbed by rent for the period to which it is made herein to pertain.

4.

A CONDITION precedent of, and intent of this lease is that FIRST PARTY must, will and shall,

and at his own risk and expense, within 30 days from the date hereon, BEGIN and continue, in good faith, the construction of a concrete building on aforesaid lots, which said concrete building shall have a frontage of fifty feet on MAIN STREET and be one hundred feet in depth.

The said building shall be constructed in accordance with plans prepared by the CHEVROLET MOTOR COMPANY, Detroit, Michigan, for the PINAL MOTOR COMPANY, Superior, Arizona, and designated as "Job No. 2912, Sheet No. 1," which plans are attached hereto, and signed on the face thereof, by the respective parties hereto, and made a part hereof as if drawn and written herein *in haec verba.*

The said plans are subject to the following exceptions and modifications:

a. The concrete walls shall be ten inches in thickness. [10]
b. The distance between the floor to the ceiling shall be sixteen feet.
c. The plate glass shall be nine feet in height.
d. There shall be only one, instead of two, toilets on the mezzanine floor.
e. The front half of the building shall have a metal ceiling; and the rear half, used for shop purposes, shall have no ceiling.
f. There shall be a plaster board partition in the middle of and across the building.
g. The floor shall be of concrete, and there shall be no basement.

h. The front sidewalk shall be covered by a substantial galvanized iron roof.

i. An entrance, adequate for automobiles, shall be provided in the rear (south side) of the building.

j. All usual plumbing and electrical fixtures shall be furnished and installed by first party; but it is expressly not the intention that first party shall equip the building with any fixtures that do not pertain to an ordinary building, or furnish such fixtures or equipment that pertain to an automobile sales and, or shop room.

5.

The second party shall, and at his expense, pay for water and lights, and first party shall not be required to pay for any thing or commodity other than is herein expressly provided, save taxes, insurance on buildings and matters of a like nature.

6.

ANY repairs due to fair wear and tear shall be borne by the first party, as well as damages due to Acts of God. Payment for any other repairs shall be at the expense of second party.

7.

In the event of destruction of the building by fire, or otherwise, the first party shall immediately begin to rebuild the same, and destruction of the building shall not terminate this lease. During the period of destruction of the building and its rebuilding and completion, no rent shall be charged or exacted.

8.

The second party agrees that at the expiration of this lease peaceable possession of the premises shall be given to first party in as good condition [11] as when occupancy began, the usual wear, inevitable accidents, and loss by fire excepted; and, to make no unlawful use of the premises.

Upon the non-payment of the whole, or any portion of the said rent when the same is above promised to be paid, the first party may, at his election, either restrain for said rent due, or declare this lease at an end, and recover possession as if the same was held by forcible detainer.

The second party waives notice of any such election or demand for possession, and TIME is expressly made as of the essence hereof.

9.

The stipulations herein contained shall apply to and be binding upon the heirs, executors, administrators, personal representatives and assigns of the respective parties hereto.

10.

The first party is a bachelor.

EXECUTED, in duplicate, at SUPERIOR, Pinal County, Arizona, NOVEMBER 30th, 1928.

ALBERT JENSEN,
First Party.

O. STANLEY DRESHER,
Second Party.

STATE OF ARIZONA,
PINAL COUNTY.

Personally appeared before me, the undersigned authority, one O. Stanley Dresher, to me per*d*onally known and by me known to be the party who executed the foregoing lease, and acknowledged that he executed the same for the uses and purposes therein stated, and as and for his free act and deed.

WITNESS my hand and NOTARIAL SEAL this 1st of December *day of NOVEMBER,* 1928.

GEO. P. STOVALL.

(Notarial Seal) GEO. P. STOVALL,
Notary Public, Pinal County, Arizona.
My commission expires September 1st, 1931.

STATE OF ARIZONA,
PINAL COUNTY.

Personally appeared before me, a notary public, one Albert Jensen, to me personally known, and by me known to be the person who executed the foregoing lease, and acknowledged that he executed the same for the uses and purposes therein stated, and as and for his free act and deed.

WITNESS my hand and notarial seal this 1st day of December, 1928.

(Notarial Seal) GEO. P. STOVALL,
Notary Public, Pinal County, Arizona.
My commission expires Sept. 1, 1931.' [12]

That the building mentioned and described in the foregoing lease was completed and possession

thereof given and the term of the lease began on March 1st, 1929.

That O. Stanley Dresher filed a voluntary petition in bankruptcy on July 18, 1930, and was adjudicated a bankrupt on July 21st, 1930; that bankrupt had failed to pay any rent to deponent as provided by the terms of said lease, for the months of April, May, June and July of 1930;

That said indebtedness of bankrupt to deponent, to wit: the sum of $621.00, was for rent accruing and earned for the months of April, May, June and July up to the 18th day thereof, the date of bankruptcy; that said amount, to wit: $621.00, is secured by virtue of the provisions of Chapter 41 of the Revised Code of Arizona, 1928, and particularly Section 1958 thereof, upon the property of the bankrupt, which was in and upon the leased premises at the date of bankruptcy and which property passed into the hands of the Trustee in bankruptcy of the above named bankrupt, and has, by said Trustee, been converted into money and the amount realized therefrom is in excess of $621.00, the amount due deponent secured by said property; that no part of the said debt has been paid; that contemporaneously with the execution of the lease, bankrupt paid to deponent $1500.00, being the last rent to accrue under said lease and covering approximately the last eight and four-sevenths months of the term of said lease.

That no note has been received for said indebtedness nor for any part thereof, nor has any judgment been rendered thereon and there are no set-offs or counterclaims to the same; except deponent

is obligated to pay, and is ready, able and willing to pay, said bankrupt and/or his Trustee in Bankruptcy interest as provided by the terms of said lease upon said sum of $1500.00, paid as rent as in said lease provided and herein recited, in the manner and at the time specified in said lease, and said deponent hereby offers so to do.

That prior to bankruptcy deponent paid to bankrupt an account of said interest sums aggregating $187.50.

That deponent does not have any other or additional security for the payment of said debt than that herein mentioned and described.

That the Trustee in Bankruptcy of the above named bankrupt abandoned the herein mentioned and described lease; that bankrupt failed to make any payments accruing under said lease subsequent to the date of bankruptcy, by reason whereof Annie Jensen on October 1st, 1930, leased the premises described in the herein mentioned and described lease to Carrol Chevrolet Motor Company upon a written lease beginning October 1st, 1930, and extending for a period of five years, and at a rental of One Hundred ($100.00) Dollars a month, for the first four months, One Hundred Twenty-five ($125.00) Dollars a month for [13] the next five months, and the balance of the term of the lease at One Hundred Fifty ($150.00) Dollars per month. Said leasing was to minimize the loss to the original Lessor, O. Stanley Dresher, and the said lease was made upon the best terms that Annie Jensen could procure;

29

That on May 2d, 1930, Albert Jensen of Miami, Arizona, a bachelor, sold and transferred to Annie Jensen the rent theretofore accrued and to thereafter accrue and conveyed the real property described in the lease herein mentioned and described to Annie Jensen, and said Annie Jensen is now the owner of said real property, and by virtue of said transfer and conveyance she is entitled to the rents accrued prior to bankruptcy, as herein stated.

ANNIE JENSEN,
CHRISTIAN JENSEN,
Creditors.

Subscribed and sworn to before me this the 21st day of January, 1931.

PAUL N. LENOZ,
Notary Public in and for the County of Gila, State of Arizona.
My commission expires Sept. 4th, 1931."

and upon objection of the trustee thereto, in the words and figures following, to wit:

"COMES NOW T. J. Sparkes, the trustee in bankruptcy of the estate of O. Stanley Dresher, bankrupt above-named, and objects to the amended proof of debt for the sum of $621.00 filed by Annie Jensen and Christian Jensen, her husband, of Miami, Arizona, on the following grounds, to-wit:

That belonging to this estate in bankruptcy and held by said claimants and which although demand has been made therefore, they neglect, fail and refuse to turn over or pay

to this estate in bankruptcy is the following sum of money, to-wit: $1,500.00, cash deposit made by bankrupt under the lease on which said amended claim is founded, together with interest at the rate of ten (10%) per cent per annum from November 30th, 1928, (date of said lease), less credits for any payment or payments of interest to said bankrupt that may be shown to have been made, and less rentals due and unpaid under said lease up to the time of the filing of the petition in bankruptcy, to-wit, July 18, 1930, and further less such charge or amount as may be allowed by the Court for the use and occupancy by this estate in bankruptcy of the [14] premises covered by the lease from the time of the filing of the petition in bankruptcy, to-wit, July 18, 1930, to the time of abandonment of said lease and vacating of said premises, to-wit*h,* September 24, 1930.

WHEREFORE, this trustee prays: That said amended proof of debt of Annie Jensen and Christian Jensen, her husband, may not be allowed, and that this Honorable Court order and direct said Annie Jensen and Christian Jensen to turn over and to pay to this trustee for the benefit of said estate in bankruptcy said sum of money held by them as aforesaid.

Dated this 26th day of January, 1931.

T. J. SPARKES,
Trustee in Bankruptcy.

WALTER J. THALHEIMER,
Attorney for Trustee."

The Referee entered an order thereon, which is in the words and figures following, to wit:

"At Phoenix, Arizona, in said District, on this 11th day of April, 1931, before Honorable R. W. Smith, Referee in Bankruptcy.

IT IS ORDERED that the sum of Fifteen Hundred Dollars ($1500.00) paid by the bankrupt on November 30, 1928 to lessor, predecessor in interest to claimant, was an advancement for the security of the lessor, title to which remained in the bankrupt, and, on his bankruptcy, title vested in the trustee; that interest on said sum of Fifteen Hundred Dollars ($1500.00) from November 30, 1928, to July 18, 1930, at the rate of ten per cent per annum, is due from claimant to the bankrupt estate; that the amount of said interest is Two Hundred Thirty-two and 80/100 Dollars ($232.80) less One Hundred Eighty-seven and 50/100 Dollars ($187.50) paid by claimant prior to bankruptcy, or Forty-five and 30/100 Dollars ($45.30).

IT IS ORDERED from said sum of Fifteen Hundred Forty-five and 30/100 Dollars ($1545.30) rental in the sum of Six Hundred Twenty-one Dollars ($621.00) due claimant for rent accrued prior to bankruptcy be offset and, in addition thereto, the further sum of Two Hundred Twenty Dollars ($220.00), which sum is hereby allowed for the use and occupancy of the leased premises by the trustee from July 18, 1930, to September 24, 1930, be also offset.

IT IS ORDERED that Annie Jensen and Christian Jensen pay to the trustee in bankruptcy

of the above named bankrupt Seven Hundred Four and 30/100 Dollars ($704.30), the amount herein found due from claimants to said bankrupt estate. [15]

Dated this 11th day of April, 1931.

R. W. SMITH,
Referee in Bankruptcy.

Service of the foregoing and receipt of copy is acknowledged this 21st day of April, 1931.

STOCKTON & PERRY,
Attorneys for Claimants."

Claimants took a review from the order of the Referee and in the Referee's Certificate on Review, the following questions were presented:

1. Was it error to order that the Fifteen Hundred Dollars ($1500.00) paid by the bankrupt November 30, 1928, to the predecessor in interest of claimants, petitioners, was an advancement for the security of the lessors and that title remained in the bankrupt and on his bankruptcy title vested in the trustee.

2. Was it error to order that Two Hundred Twenty Dollars ($220.00) be allowed for the use and occupancy of the leased premises by the trustee from July 18, 1930, the date of bankruptcy, to September 18, 1930, the date the lease was abandoned by the trustee and the premises surrendered to the claimants, petitioners, or should there have been ordered allowed for the use and occupancy of said leased premises by said trustee for said period the rent stipulated in the lease, to wit, One Hundred Seventy-five Dollars ($175.00) per

month, or the total sum of Three Hundred Eighty-five Dollars ($385.00).

3. Was it error to order that claimants, Annie Jensen and Christian Jensen, pay to the trustee in bankruptcy Seven Hundred Four and 30/100 Dollars ($704.30) representing the difference between Fifteen Hundred Dollars ($1500.00) and unpaid interest thereon, and the rent accruing prior to bankruptcy plus the amount allowed for use and occupancy of the leased premises by the trustee after bankruptcy and to September 24, 1930, the date the lease was [16] abandoned by the trustee and possession surrendered to claimants, petitioners.

The United States District Judge modified the order of the Referee and as modified affirmed the same. The order of said District Judge is in the words and figures following, to wit:

"The petition to review Referee's order in the above entitled and numbered bankruptcy matter came on regularly for hearing before the Honorable Fred C. Jacobs, United States District Judge, on May 25th, 1931, at which time the petitioners were represented by their attorneys, Stockton & Perry, and the Trustee in Bankruptcy was represented by his attorney, Walter J. Thalheimer.

After argument of counsel, the Court, being fully advised in the premises,

IT IS ORDERED that the Order of the Referee, dated April 11th, 1931, be modified so as to read as modified as follows:

At Phoenix, Arizona, in said District, on this

11th day of April, 1931, before Honorable R. W. Smith, Referee in Bankruptcy.

IT IS ORDERED that the sum of Fifteen Hundred Dollars ($1500.00) paid by the bankrupt on November 30, 1928, to the lessor, predecessor in interest to claimant, was an advancement for the security of the lessor, title to which remained in the bankrupt, and, on his bankruptcy, title vested in the trustee; that interest on said sum of Fifteen Hundred Dollars ($1500.00) from November 30, 1928, to July 18, 1930, at the rate of ten per cent per annum, is due from claimant to the bankrupt estate; that the amount of said interest is Two Hundred Thirty-two and 80/100 Dollars ($232.80) less One Hundred Eighty-seven and 50/100 Dollars ($187.50) paid by claimant prior to bankruptcy, or Forty-five and 30/100 Dollars ($45.30).

IT IS ORDERED that from said sum of Fifteen Hundred Forty-five and 30/100 Dollars ($1545.30), rental in the sum of Six Hundred Twenty-one Dollars ($621.00) due claimant for rent accrued prior to bankruptcy be offset and, in addition thereto, the further sum of Four Hundred Twenty-nine Dollars ($429.00), which sum is hereby allowed for the use and occupancy of the leased premises by the Trustee from July 18th, 1930, to October 1st, 1930, be also offset.

IT IS ORDERED that Annie Jensen and Christian Jensen pay to the Trustee in Bankruptcy of the above named bankrupt Four Hundred Ninety-five and 30/100 Dollars ($495.30), the

amount herein found due from claimant to said bankrupt estate.

Dated this 11th day of April, 1931.

R. W. SMITH,
Referee in Bankruptcy. [17]

Service of the foregoing and receipt of copy is acknowledged this 21st day of April, 1931.

STOCKTON & PERRY,
Attorneys for Claimants.

And as so modified, the said Order of the Referee is hereby approved and affirmed.

An exception is allowed the Trustee and an exception is also allowed petitioners.

Done in open co*ut* this, the twenty-fifth day of May, 1931.

F. C. JACOBS,
United States District Judge."

WALTER J. THALHEIMER,
Attorney for Trustee.

HENDERSON STOCKTON,
ALLAN K. PERRY,
E. G. FRAZIER,
STANLEY A. JERMAN,
THOMAS P. RIORDAN,
Attorneys for Claimants, Annie Jensen and Christian Jensen.

The above and foregoing statement of the case prepared and signed by the parties in interest, showing how the questions arose and were decided in the District Court, is approved as being all

that is essential to a decision of such questions by the appellate court.

F. C. JACOBS,
United States District Judge.

Dated June 20th, 1931.

Filed Jun. 22, 1931. [18]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable F. C. JACOBS, United States District Judge for the District of Arizona:

Annie Jensen and Christian Jensen, conceiving themselves aggrieved by an order and decree of the United States District Court for the District of Arizona, made and entered on the Twenty-fifth day of May, 1931, modifying and, as modified, affirming an order of the Referee, dated the eleventh day of April, 1931, in the above-entitled matter of O. Stanley Dresher, Bankrupt, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said order and decree of May 25th, 1931, and pray that this appeal be allowed and that citation upon appeal issue, as provided by law, and that a transcript of the record, proceedings and documents upon which said order and decree were made, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, within said Circuit, as does the law and the rules

of such court in such cases made and provided require.

Dated at Phoenix, Arizona, this the twentieth day of June, 1931.

HENDERSON STOCKTON,
ALLAN K. PERRY,
E. G. FRAZIER,
THOMAS P. RIORDAN,
STANLEY A. JERMAN,

Solicitors for Annie Jensen and Christian Jensen. [19]

Received copy of the within this 20th day of June, 1931.

WALTER J. THALHEIMER,
Attorney for T. J. Sparkes, Trustee.

Filed Jun. 20, 1931. [20]

[Title of Court and Cause.]

ASSIGNMENT OF ERROR.

Come now Annie Jensen and Christian Jensen, by Henderson Stockton, Allen K. Perry, E. G. Frazier, Thomas P. Riordan and Stanley A. Jerman, their solicitors of record herein, and in connection with their appeal herewith filed make it known that in the record, proceedings and the decree appealed from manifest error has intervened to the prejudice of Annie Jensen and Christian Jensen, appellants in these things, to wit:

FIRST.

The District Court erred in ordering that the sum of Fifteen Hundred ($1500.00) Dollars, paid by the bankrupt on November 30th, 1928, to lessor, predecessor in interest to claimants, was an advancement for the security of the lessor and that title to said Fifteen Hundred ($1500.00) Dollars remained in the bankrupt and on his bankruptcy title thereto vested in the Trustee, because the lease, pursuant to which same was paid, provides that said sum was paid as rent and the admitted facts so show.

SECOND.

The District Court erred in directing that Six Hundred Twenty-one ($621.00) Dollars due claimants for rent accrued prior to bankruptcy and the further sums of Four Hundred Twenty-nine ($429.-00) Dollars allowed for the use and occupancy of the leased premises from July 18th, 1930, to October 1st, 1930, be offset against the sum of Fifteen Hundred Forty-five and 30/100 ($1545.30) Dollars, and that the difference, to wit: Four Hundred Ninety-five [21] and 30/100 ($495.30) Dollars, be paid by Annie Jensen and Christian Jensen to the Trustee in Bankruptcy of O. Stanley Dresher, Bankrupt, because Fifteen Hundred ($1500.00) Dollars of the said sum of Fifteen Hundred Forty-five and 30/100 ($1545.30) Dollars was paid as rent and was not given by lessor at the time the lease in question was made as security and because it should have been ordered that the Trustee in Bankruptcy pay to Annie Jensen and Christian Jensen said respective

sums of Six Hundred Twenty-one ($621.00) Dollars and Four Hundred Twenty-nine ($429.00) Dollars, less Forty-five and 30/100 ($45.30) Dollars, and because Four Hundred Ninety-five and 30/100 ($495.30) Dollars was neither legally due nor payable by Annie Jensen and Christian Jensen to said Trustee. In other words, the amended proof of claim of Annie Jensen and Christian Jensen should have been allowed without offset upon the agreed statement of facts.

BY REASON WHEREOF, Annie Jensen and Christian Jensen pray that the decree appealed from may be reversed and remanded, with directions to proceed in accordance with the law.

HENDERSON STOCKTON,
ALLAN K. PERRY,
E. G. FRAZIER,
THOMAS P. RIORDAN,
STANLEY A. JERMAN,

Solicitors for Annie Jensen and Christian Jensen.

Received copy of the within this 20th day of June 1931.

WALTER J. THALHEIMER,
Attorney for T. J. Sparkes, Trustee.

Filed Jun. 20, 1931. [22]

[Title of Court and Cause.]

STIPULATION THAT NO COST BOND ON APPEAL BE FILED.

IT IS HEREBY STIPULATED by and between

Annie Jensen and Christian Jensen, by their attorneys, Stockton & Perry, and T. J. Sparks, Trustee in Bankruptcy of O. Stanley Dresher, Bankrupt, by his attorney, Walter J. Thalheimer, that no cost bond be given by either party on appeal to the United States Circuit Court of Appeals from the order of the United States District Judge, dated May 25th, 1931, modifying and, as modified, affirming an order of the Referee, dated April 11th, 1931.

HENDERSON STOCKTON,
ALLAN K. PERRY,
E. G. FRAZIER,
T. P. RIORDAN,
STANLEY A. JERMAN,
Attorneys for Annie Jensen and Christian Jensen.

WALTER J. THALHEIMER,
Attorney for Trustee in Bankruptcy.

Filed Jun. 20, 1931. [23]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND DIRECTING THAT NO BOND ON APPEAL BE REQUIRED.

Annie Jensen and Christian Jensen, having within the time prescribed by law filed herein their petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order and decree of the above-entitled District Court, made and entered in the above numbered and entitled cause, under date of May 25th, 1931,

modifying and, as modified, affirming an order of the Referee, dated the eleventh day of April, 1931.

THEREFORE, upon motion of Henderson Stockton, one of the solicitors for Annie Jensen and Christian Jensen,—

IT IS HEREBY ORDERED that the appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and decree of said District Court, hereinbefore referred to, be and the same is hereby allowed and that a certified transcript of the record be forthwith by the Clerk of this District Court transmitted to said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

IT APPEARING to the Court that interested parties have waived an appeal bond by a written stipulation filed herein, it is, by reason thereof, ORDERED that no appeal bond be required on this appeal.

Dated June 22*st*, 1931.

F. C. JACOBS,
United States District Judge.

Received copy of the within this 20th day of June, 1931.

WALTER J. THALHEIMER,
Attorney for T. J. Sparkes, Trustee.

Filed Jun. 22, 1931. [24]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the Above-entitled Court:

YOU ARE HEREBY DIRECTED to prepare and certify a transcript of the record in the above-entitled cause for the use of the United States Circuit Court of Appeals for the Ninth Circuit, and to include therein the following:

1. A statement of the case, showing how the questions arose and were decided in the District Court, prepared and signed by the parties with the approval of the District Court.
2. Order or decree of the District Court, dated the twenty-fifth day of May, 1931.
3. The petition for appeal of Annie Jensen and Christian Jensen, filed herein under date of June 20th, 1931.
4. Assignments of error filed herein by Annie Jensen and Christian Jensen under date of June 20th, 1931.
5. The order allowing appeal filed June 20th, 1931.
6. Citation upon appeal.
7. This praecipe.

Dated June 20th, 1931.

HENDERSON STOCKTON,
ALLAN K. PERRY,
E. G. FRAZIER,
THOMAS P. RIORDAN,
STANLEY A. JERMAN,

Solicitors for Annie Jensen and Christian Jensen.

[25]

I hereby acknowledge receipt of service of praecipe for record on appeal and waive notice of the filing thereof.

Dated June 20th, 1931.

WALTER J. THALHEIMER,

Solicitor for Trustee in Bankruptcy of O. Stanley Dresher, Bankrupt.

Filed Jun. 22, 1931. [26]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, J. Lee Baker, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said court, including the records, papers and files in the Matter of O. Stanley Dresher, Bankrupt, numbered B.-557—Phoenix, on the docket of said court.

I further certify that the attached pages, numbered 1 to 30, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as said Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $5.90, and that said sum has been paid to me by counsel for the appellant.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the seal of the said court this 26th day of June, 1931.

[Seal] J. LEE BAKER,
Clerk. [27]

[Title of Court and Cause.]

CITATION ON APPEAL.

The President of the United States of America, to T. J. Sparks, Trustee in Bankruptcy of O. Stanley Dresher, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, within thirty days

from and after the date of this citation, pursuant to an order allowing an appeal duly made and entered and filed in the office of the Clerk of the above-named District Court, under date of the twentieth day of June, 1931, which said appeal is from the final order and decree of said District Court in the above numbered and entitled matter, made and entered on the twenty-fifth day of May, 1931, modifying and, as modified, affirming an order of the Referee of the eleventh day of April, 1931, to show cause, if any there be, why said order and decree rendered against said Annie Jensen and Christian Jensen, appellants, should not be reversed and set aside and why justice should not be done to the parties in that behalf.

WITNESS the Honorable F. C. JACOBS, United States District Judge, in the District of Arizona, this the twentieth day of June, A. D. 1931, and of the Independence of the United States of America the One Hundred Fifty-sixth.

Dated June 22d, 1931.

[Seal] F. C. JACOBS,
United States District Judge. [28]

I hereby acknowledge receipt of service of the above and foregoing citation on appeal this, the twentieth day of June, 1931.

WALTER J. THALHEIMER,
Solicitor for Trustee in Bankruptcy of O. Stanley Dresher, Bankrupt. [29]

Filed Jun. 22, 1931. [30]

[Endorsed]: No. 6533. United States Circuit Court of Appeals for the Ninth Circuit. Annie Jensen and Christian Jensen, Appellants, vs. T. J. Sparkes, Trustee in Bankruptcy of O. Stanley Dresher, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed July 23, 1931.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Frank H. Schmid,

Deputy Clerk.

No. 6533

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANNIE JENSEN and CHRISTIAN JENSEN,
Appellants,

vs.

T. J. SPARKES, Trustee in Bankruptcy of O. STANLEY DRESHER, Bankrupt,
Appellee.

Brief of Appellants

Upon Appeal from the United States District Court for the District of Arizona.

HENDERSON STOCKTON,
ALLAN K. PERRY,
E. G. FRAZIER,
THOMAS P. RIORDAN,
STANLEY A. JERMAN,
Attorneys for Appellants.

TABLE OF CONTENTS

Page

Statement of the Case 1
Specification of Errors 7

Brief of Argument:

I. The fifteen hundred dollars was a part of the consideration for the execution of the lease by the lessor and was not a mere deposit to secure lessee's performance of his covenants thereunder 8

II. If the fifteen hundred dollars was deposited as security and not in payment of rent, the trustee could not abandon the lease and retain the security. In no event is the trustee entitled to more than one hundred fifty dollars of such sum 29

TABLE OF CASES AND AUTHORITIES

Page

Arizona, Revised Code, 1928, Sec. 1958 32
Alvord vs. Banfield, 85 Ore. 49, 166 Pac. 549 29
Casino Amusement Co. vs. Ocean Beach Amusement Co. (Fla.), 133 So. 559 11
Collier vs. Wages (Tex. Civ. App.), 246 S. W. 746 11
Cunningham vs. Stockon, 81 Kan. 780; 106 Pac. 1057 22
Evans vs. McClure, 108 Ark. 531; 158 S. W. 487 22-23
Forgotston vs. Brafman, 84 N. Y. Supp. 237 22

Page

Foye vs. Simpkinson (Cal. App.), 264 Pac. 331 19
Frey, In re, 26 Fed. (2d) 472 29
Galbraith vs. Wood, 124 Minn. 210; 144 N. W. 945; 50 L. R. A. (N. S.) 1034 10
Harvey vs. Weisbaum, 159 Cal. 265; 113 Pac. 656; 33 L. R. A. (N. S.) 540 13-14
Moumal vs. Parkhurst, 89 Ore. 248; 173 Pac. 669 25
Peebles vs. Sherman, 148 Minn. 282; 181 N. W. 715 22
Phegley vs. Enke's City Dye Works, 127 Ore. 539; 272 Pac. 898 ..... 22, 28
Pigg vs. Kelley (Cal. App.) 268 Pac. 463 21
Rosenblum vs. Uber, 256 Fed. 584, 167 C. C. A. 614, 43 A. B. R. 480 30
Redmon vs. Graham (Cal.), 295 Pac. 1031 29
Ruling Case Law, Vol. 16, p. 931 9
Schoen vs. New Britain Trust Co., 111 Conn. 466; 150 Atl. 696 11
Sinclair vs. Burke (Ore.), 287 Pac. 686 21
Sun Drug Co., In re, 4 Fed. (2d) 843; 6 A. B. R. (N. S.) 160 ..... 9, 31
Tanory, In re, 270 Fed. 872 29
Wetzler vs. Patterson, 73 Cal. App. 527; 238 Pac. 1077 14-15

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANNIE JENSEN and CHRISTIAN JENSEN, *Appellants,* vs. T. J. SPARKES, Trustee in Bankruptcy of O. STANLEY DRESHER, Bankrupt, *Appellee.*	No. 6533

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Arizona.

STATEMENT OF THE CASE

This is an appeal by claimants in bankruptcy from an "Order of United States District Judge on Review from Referee." (Tr., p. 1.)

There is no dispute as to the facts and they may be briefly summarized thus:

November 30, 1928, Albert Jensen, as lessor, entered into a written lease with O. Stanley Dresher (Tr., p. 4),

the provisions of which, deemed by appellants to be material to this appeal, follows:

"THE SECOND PARTY" (Dresher), "in consideration of the leasing of the premises as above set forth, covenants and agrees with the first party" (Jensen) "to pay to the first party, as rent for the same, the MONTHLY sum of ONE HUNDRED and SEVENTY FIVE ($175.00) DOLLARS, but this is a lease for five years, and not from month to month, and said rent shall be paid in the manner following:

a. The monthly payments of $175.00 shall be paid in advance on the first day of each month.

b. In event that occupancy should be started other than on the first day of a month, then the first payment shall be paid in advance, and is to be computed on the basis of $175.00 per month from date of beginning of occupancy to the last day of the month in which occupancy begins.

c. On the date of the execution and acknowledgment of this lease by the respective parties, the SECOND PARTY is to and shall pay to first party the sum of ONE THOUSAND FIVE HUNDRED ($1,500.00) DOLLARS, being, approximately, for the last eight and four-sevenths months of the five year period covered by the lease.

d. The first party is to and shall pay to second party interest on said FIFTEEN HUNDRED ($1500.00) DOLLARS at the rate of ten per cent per annum, said interest payable annually, and said interest shall begin to run from the date the said $1,500.00 is paid to first party by second party, and shall continue in effect, *pro tanto,* until the entire $1,500.00

shall have been earned and absorbed by rent for the period to which it is made herein to pertain." (Tr., pp. 9-10.)

"A condition precedent of, and intent of this lease is that First Party" (Jensen) "must, will and shall, and at his own risk and expense, within 30 days from the date hereon, begin and continue, in good faith, the construction of a concrete building on aforesaid lots, which said concrete building shall have a frontage of fifty feet on Main Street and be one hundred feet in depth.

The said building shall be constructed in accordance with plans prepared by the Chevrolet Motor Company, Detroit, Michigan, for the Pinal Motor Company, Superior Arizona, and designated 'Job No. 2912, Sheet No. 1,' which plans are attached hereto, and signed on the face thereof, by the respective parties hereto, and made a part hereof as if drawn and written herein *in haec verba.*" (Tr., pp. 10-11.)

November 30, 1928, Dresher paid Jensen the Fifteen Hundred Dollars above mentioned. (Tr., p. 4.)

Under the terms of said lease, Dresher went into possession of the leased premises March 1, 1929, and continued therein until July 18, 1930, when he was adjudged a voluntary bankrupt. (Tr., p. 4.) Appellee Sparkes is the trustee of such bankrupt estate. (Tr., p. 4.)

May 2, 1929, Albert Jensen assigned the lease and the rent due and to accrue thereunder and deeded the demised premises to Annie Jensen (wife of Christian Jensen) (Tr., p. 6) and at all times thereafter Annie Jensen has been the owner of said property and entitled to the rent accruing under the aforementioned

lease and if any obligation existed on the part of Albert Jensen by virtue of the payment of Fifteen Hundred Dollars by Dresher as aforesaid, that obligation has been assumed by Annie Jensen. (Tr., p. 6.)

Dresher failed to pay his rent for the months of April, May, June, and the first seventeen days of July, 1930, amounting to Six Hundred Twenty-one Dollars ($621.00). (Tr., pp. 4-5.) Appellants paid Dresher interest upon the sum of Fifteen Hundred Dollars ($1500.00) aforementioned. (Tr., p. 5.) Dresher paid no rent after his adjudication in bankruptcy. (Tr., p. 5.)

Sparkes, trustee as aforesaid, abandoned the lease and vacated the demised premises September 24, 1930. (Tr., p. 5.) About October 1, 1930, Annie Jensen leased such premises to Carroll Chevrolet Motor Company for a five-year term beginning October 1, 1930, at a rental of One Hundred Dollars per month for the first four months, One Hundred Twenty-five Dollars per month for the next five months and One Hundred Fifty Dollars per month for the balance of the term. This lease was made upon the most favorable terms that Annie Jensen could obtain by the use of due diligence. (Tr., p. 6.) After Sparkes qualified as trustee, he demanded of Annie Jensen the payment and return of the Fifteen Hundred Dollars paid by Dresher and mentioned in the provisions of the lease hereinabove quoted. She refused to make such payment (Tr., p. 7) but on January 23, 1931, appellants, Annie Jensen and Christian Jensen, filed with the Referee in Bankruptcy their claim

against the estate of Dresher for Six Hundred Twenty-one Dollars rent accrued to the date of bankruptcy. (Tr., pp. 7-8.)

The trustee filed his objections to such claim upon the following grounds:

> "That belonging to this estate in bankruptcy and held by said claimants and which although demand has been made therefore, they neglect, fail and refuse to turn over or pay to this estate in bankruptcy is the following sum of money, to-wit: $1,500.00, cash deposit made by bankrupt under the lease on which said amended claim is founded, together with interest at the rate of ten (10%) per cent per annum from November 30th, 1928, (date of said lease), less credits for any payment or payments of interest to said bankrupt that may be shown to have been made, and less rentals due and unpaid under said lease up to the time of the filing of the petition in bankruptcy, to-wit, July 18, 1930, and further less such charge or amount as may be allowed by the Court for the use and occupancy by this estate in bankruptcy of the premises covered by the lease from the time of the filing of the petition in bankruptcy, to-wit, July 18, 1930, to the time of abandonment of said lease and vacating of said premises, to-wit, September 24, 1930." (Tr., pp. 17-18.)

Upon a hearing upon such claim, and the trustee's objections thereto, the Referee found that the Fifteen Hundred Dollars was an "advancement for the security of the lessor, title to which remained in the bankrupt, and, on his bankruptcy, title vested in the trustee," computed the interest unpaid upon such "advancement" to be Forty-five and 30/100 Dollars, offset

against the aggregate of Fifteen Hundred Forty-five and 30/100 Dollars, Six Hundred Twenty-one Dollars rent accrued to the date of bankruptcy and Two Hundred Twenty Dollars for the use of the premises by the trustee after bankruptcy, and ordered that the claimants, Annie Jensen and Christian Jensen (appellants herein) pay the trustee the balance of Seven Hundred Four and 30/100 Dollars. (Tr., pp. 19-20.)

Upon review of the Referee's order, the District Court increased the allowance for the use of the premises by the trustee to Four Hundred Twenty-nine Dollars and modified the Referee's order so as to direct the claimant-appellants to pay the trustee only the sum of Four Hundred Ninety-five and 30/100 Dollars, the reduction being effective by reason of the increased allowance for the trustee's use of the premises. As so modified, the order of the Referee was, by the District Judge, affirmed. (Tr., pp. 21-22.)

One question to be determined upon the appeal, as it appears to the appellants herein, is whether the Fifteen Hundred Dollars above mentioned was paid by the bankrupt as a mere deposit to secure the faithful performance of his covenants under the lease, or if it was paid as a consideration for the execution of the lease as rent "approximately for the last eight and four-sevenths months of the five-year period covered by the lease;" it being appellants' contention that it was paid as part of the consideration for the lease and appellee's contention that it was a mere deposit.

There is no other question to be determined on the

appeal, unless it be decided that the mentioned Fifteen Hundred Dollars was paid by the bankrupt as a mere deposit to secure the faithful performance of his covenants under the lease. If such should be the court's decision, the further question then will be: Do appellants have the right to retain Thirteen Hundred Fifty Dollars or all of said sum because of the breach by O. Stanley Dresher of the covenants of the lease after bankruptcy and after the demised premises had been released by appellants to minimize damages, in consequence of which a loss to appellants and a liability against O. Stanley Dresher has been established?

SPECIFICATION OF ERRORS

I. The District Court erred in ordering that the sum of Fifteen Hundred Dollars, paid by the bankrupt on November 30, 1928, to lessor, was an advancement for the security of the lessor; and that title to said Fifteen Hundred Dollars remained in the bankrupt; and on his bankruptcy title thereto vested in the Trustee; because the lease, pursuant to which same was paid, provides that said sum was paid as rent and the admitted facts so show. (Appellants' First Assignment of Error, Tr., p. 26.)

II. The District Court erred in directing that Six Hundred Twenty-one Dollars due claimants for rent accrued prior to bankruptcy and the further sums of Four Hundred Twenty-nine Dollars allowed for the use and occupancy of the leased premises from July 18, 1930, to October 1, 1930, be offset against the sum of

Fifteen Hundred Forty-five and 30/100 Dollars, and that the difference, to-wit: Four Hundred Ninety-five and 30/100 Dollars, be paid by Annie Jensen and Christian Jensen to the Trustee in Bankruptcy of O. Stanley Dresher, Bankrupt, because Fifteen Hundred Dollars of the said sum of Fifteen Hundred Forty-five and 30/100 Dollars was paid as rent and was not given to lessor as security; and because it should have been ordered that the Trustee in Bankruptcy pay to Annie Jensen and Christian Jensen said respective sums of Six Hundred Twenty-one Dollars and Four Hundred Twenty-nine Dollars, less Forty-five and 30/100 Dollars, and because Four Hundred Ninety-five and 30/100 Dollars was neither legally due nor payable by Annie Jensen and Christian Jensen to said Trustee. In other words, the amended proof of claim of Annie Jensen and Christian Jensen should have been allowed, without offset, upon the agreed statement of facts. (Appellants' Second Assignment of Error, Tr., pp. 26-27.)

BRIEF OF ARGUMENT

I. THE FIFTEEN HUNDRED DOLLARS WAS A PART OF THE CONSIDERATION FOR THE EXECUTION OF THE LEASE BY THE LESSOR AND WAS NOT A MERE DEPOSIT TO SECURE LESSEE'S PERFORMANCE OF HIS CONVENANTS THEREUNDER.

If the Fifteen Hundred Dollars was paid by the bankrupt as a mere deposit to secure the faithful per-

formance of his covenants under the lease, and if the lease has been terminated, (which appellants do not concede) then the trustee is entitled to the return of the deposit less the amount of any rent due and unpaid at the time the lease was terminated; but if it was paid as a consideration for the execution of the lease or, as appellants contend, as rent "approximately, for the last eight and four-sevenths of the five year period covered by the lease," return can not be enforced, even though the lease terminated prior to its expiration by limitation. See In re Sun Drug Company (9th Circuit Court of Appeals, March 9, 1925), 4 Fed. (2d) 843, 6 A. B. R. (N. S.) 160, wherein this court, speaking through the late Circuit Judge Rudkin, says:

> "If the $5,000 paid by the lessee at the time of executing the lease was a mere advancement to secure the faithful performance of the covenants of the lease, the lessee or his successor in interest was entitled to a return of the money thus advanced, upon the determination of the lease, less the amount of any rent due and unpaid at the time of such determination. But, if the $5,000 was paid as a consideration for the execution of the lease, no part of that consideration was recoverable, either by the lessee or by the trustee in bankruptcy. We think all the authorities are agreed upon these two propositions."

The proper construction to be placed upon the lease in the instant matter may be determined from a review of the available authorities.

What appears to appellants to be a fair statement of the general law applicable to the situation is found in 16 R. C. L., 931, thus:

> "Provision is sometimes made in a lease for the payment in advance of the rents of the last or later periods of the lease, and such a provision has been held not to be a security merely for the lessee's performance of his agreements in the lease, but purely a payment of rent in advance, and therefore may be retained by the lessor though he terminates the lease for the default of the lessee as provided for in the lease."

The leading American case, and one closely in point with that at bar, appears to be Galbraith, Trustee in Bankruptcy of Geo. R. Kibbe, Bankrupt, vs. Wood, 124 Minn. 210, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, decided by the Supreme Court of Minnesota under date of January 2, 1914. That case involved a lease upon a proposal made by the lessee as follows:

> "At the time of the execution of said lease I will pay you the sum of Twenty Thousand ($20,000) Dollars as an advance payment on rent, which advance I will keep good during the first five (5) years of said lease, with privilege of reducing at the rate of Six Thousand Six Hundred Sixty-six Dollars and Sixty-six Cents ($6,666.66) per year for the third, fourth and fifth years of said term."

The trustee in bankruptcy of the lessee made the same contention there that is made by the trustee-appellee here. At the conclusion of a well reasoned opinion by Mr. Justice Bunn, the court holds:

> "The $20,000 payment was made as an advance payment on the rent for the third, fourth, and fifth years of the term; that it was the default of the tenant that prevented his right to have the payment so applied; and that neither he nor plaintiff,

> who of course stands in his shoes, can recover back the payment so made."

To the same effect see Collier vs. Wages, 246 S. W. 746, decided by the Texas Court of Civil Appeals in 1922.

In Casino Amusement Company vs. Ocean Beach Amusement Company, decided by the Supreme Court of Florida, April 2, 1931, ... Fla. ....., 133 S. 559, the lease provided that the sum of Twenty-five Thousand Dollars "paid at the time of the signing of the lease, the receipt of which is hereby acknowledged, shall be credited as rent for the last year of the lease." The lease was for ninety-nine years from January 1, 1925. When but a small fraction of the lease period had expired, the tenant defaulted in paying an installment of rent and was ousted. It brought suit against the landlord for return of the Twenty-five Thousand Dollars advance payment of rent. After reviewing the authorities, the court held:

> "The lease involved in this case expressly provides for an advance payment of rent, not a deposit as security for the performance of the contract, as contended."

and affirmed the trial court's order sustaining a demurrer to the tenant's petition for the return of the advance payment.

To the same effect, appellants cite Schoen vs. New Britain Trust Company (Supreme Court of Errors of Connecticut, June 2, 1930), 111 Conn. 466, 150 Atl. 696, wherein it is said:

"The plaintiffs' recovery of the $15,000 payment depends upon the construction which may be given this provision of the lease: 'The lessor hereby acknowledges the receipt of fifteen thousand dollars, which is to be applied on the last year's payment.' The only payments referred to in the lease are those for rent; 'the last year's payment' obviously refers to the payment of rent—that of the last year of the term of the lease. The period of the lease was ten years; the last year's payment under the lease was $15,000. Two constructions of this provision are claimed—by the plaintiffs that it is a deposit or security; by the defendant that it is a prepayment of rent. The lease is characterized by a complete absence of anything, in terms or words, or by inference, indicating that the $15,000 was a mere deposit as security for the rent. It neither states for what the $15,000 was security nor provides that there should be no breach of the performance for which this amount is claimed to be security. No construction is open to the plaintiffs which will enable them to claim this to be security, unless there can be found in the lease the words 'deposit for security' or their equivalent, and in addition words which signify in terms or by inference for what the deposit was security. The lease does not provide for the return of the $15,000, nor can there be found in it the intendment of the parties by the payment to provide a security for the performance by the lessee of his obligation under the lease.

The lessor was leasing a theater, a property unsuited for another business, for a long period. He must have had in mind the changing character of the business and the location, and the consequent risk to the owners of the property. He must have known that, if the lease were cancelled, or the lessee abandoned his lease, for a considerable period the

theater might be vacant, or a suitable tenant be hard to obtain, and damage to his property might ensue. It was most reasonable for the lessor to protect himself against loss of rental and damage to his property by a provision, such as this, for the payment of the last year's rent.

If the $15,000 was mere security for rent, the lessee might default in the middle of the term and the lessor be compelled to evict him and recover the actual rent due and pay back the deposit, or continue to suffer the persistent default in rent for the whole or a part of the deposit and return the balance. The property of the lessor or its business uses would be apt to be seriously prejudiced if the lessee could act in this way. *The construction of this amount as rent rather than as a deposit for security is the most reasonable one from the standpoint of the lessor and not unfair to the lessee, who must, at the inception of the lease, have intended to perform the covenants and conditions of the lease.*" (Italics ours.)

It will be observed that in the matter here under review, Jensen, the lessor, was by the terms of the lease required to construct a concrete building upon the premises for the use of the lessee, Dresher, in accordance with a special plan prepared by the Chevrolet Motor Company. He was compelled to pay out considerable money (certainly more than the advance payment of rent) in making this improvement. The reasoning employed in the Schoen case, *supra,* is equally applicable to the case at bar; as is that of the Supreme Court of California in Harvey vs. Weisbaum, 159 Cal. 265, 113 Pac. 656, 33 L. R. A. (N. S.) 540, wherein the court says:

"The question, and the only question, that need be decided, is as to whether or not a tenant who has taken possession of the leased premises and paid his rent, or a part of it, in advance, as required by the terms of the lease, can, in the absence of any covenant in the lease, recover the rent so paid in case of the total destruction of the premises by fire without any fault of either party to the lease. . . . The consideration for the advance payment is not only the use of the premises for the month during which the lessee is to use them under the lease, but the conveyance by way of lease and the obtaining possession of the premises. The lease is an interest in real property passing from the lessor to the lessee. *In many cases the landlord may have expended more money than the advanced rent, and for the very reason that he is receiving rent in advance.* It may have been the very inducement to the lease. The destruction of the premises by fire being unforseen, and without the fault of either party in contemplation of law, they each must suffer, and being equally innocent, why should the law interfere to aid the lessee in a case where he had not taken the precaution to provide in his lease for the contingency? The lessee has only paid the money he agreed to pay at the time he agreed to pay it; and, as he has not seen fit to have any provision inserted in the lease as to the recovery of the advance rent, or a part thereof, in case the premises are destroyed by fire, the law will not insert such provision for him, particularly as in many cases it might work a great hardship on the lessor."

Another California case that appears to the appellants to be closely in point to that at bar is Wetzler v. Patterson, decided by the District Court of Appeal for the Second District, July 9, 1925, 73 Cal. App. 527, 238 Pac. 1077. We quote from the opinion as follows:

"Of the covenants on the part of the lessee the instrument contains the following:

> ' . . . The lessee agrees and binds himself: (1) To yield and pay to the lessors as rental for use of the above premises for the term above mentioned the full sum of $8,400, payable at the times and in the amounts as hereinafter set forth, to-wit: $933.33 upon the execution and delivery of this lease, of which amount $233.33 shall be credited by the lessors upon the rental of the premises for the first month, to-wit, the month beginning upon the 15th day of July, 1920, and ending upon the 15th day of August, 1920; $700 of this amount shall be credited by the lessor for the rental due upon said lease for the last three months of the full term of said lease, to wit, for the three months beginning on the 15th day of April, 1923.'

It is then provided that a monthly rental of $233.33 shall be paid on the 15th day of each of the remaining months of the term, namely, on August 15, 1920, and on the 15th day of each succeeding month thereafter until and including the 15th day of March, 1923. Following certain other covenants on the part of the lessee, this paragraph occurs:

> 'It is further agreed by the lessee that upon the breach of any of the conditions above mentioned the sum of $700 heretofore mentioned as rent reserved for the last three months of this lease shall be forfeited to the lessor for breach of the conditions of this lease.'

It is further provided that 'the lessor may enter . . . to expel the lessee if he shall fail to pay the rent as aforesaid.' We have set forth all of the provisions of the instrument which relate to rent, including the times, amounts, and manner of its payment.

On July 7, 1920, defendant took possession of the premises under the lease, and regularly paid the rent until the following month of November. He vacated the premises within a week after the commencement of the unlawful detainer action.

. . .

Appellant's several points, reduced to their simplest form, are: (1) That the court erred in not applying the $700 deposit to the satisfaction of the unpaid monthly rentals; and (2) . . .

(1) The first of these contentions turns upon the true meaning and purpose of that provision of the lease whereby it was agreed that, of the $933.33 to be paid to respondents upon the execution of the lease, $700 should be credited to the rentals for the last three months of the term. If the $700 was intended to be a mere deposit by way of security to insure the faithful performance of appellant's covenants, then upon the forfeiture of the lease, which occurred when appellant failed to pay the accrued rent within the time fixed by the three days' statutory notice, the latter would be entitled to a return of the sum so deposited by him, less the amount of the rent then due and unpaid; and in such case it would be immaterial whether the sum so deposited as security be regarded as a penalty or as liquidated damages. Green v. Frahm, 176 Cal. 259, 168 P. 114; Rez v. Summers, 34 Cal. App. 527, 168 P. 156; Blessing v. Fetters, 40 Cal. App. 471, 191 P. 108. If, however, instead of intending the $700 to be a deposit to secure the faithful performance of appellant's covenants, the parties intended that this sum should be regarded as a payment to respondents upon the contract, by way of part performance by appellant; i. e. if it was intended to be an advance payment for and on account of the last 3 months' installments of rent—then and in that case no part of the $700 can be recovered by appellant, nor can any part of it be off-

set against the amounts sued for by respondents in these actions. The general rule deducible from the authorities is that rent paid in advance cannot be recovered by the tenant upon the termination of the lease for condition broken, when such termination was not brought about by the wrongful act of the landlord. Curtis v. Arnold, 43 Cal. App. 97, 184 P. 510; Galbraith v. Wood, 124 Minn. 210, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, Ann. Cas. 1915B, 609, and authorities cited in the note thereto; Dutton v. Christie, 63 Wash. 373, 115 P. 856; Rockwell v. Eiler's Music House, 67 Wash. 478, 122 P. 12, 39 L. R. A. (N. S.) 894; Evans v. McClure, 108 Ark. 531, 158 S. W. 487; Collier v. Wages (Tex. Civ. App.) 246 S. W. 743; Hepp Wall Paper, etc., Co. v. Deahl, 53 Colo. 274, 125 P. 491. 'In case the rent has been paid in advance under a stipulation that it shall be so paid, and the landlord re-enters for conditions broken, even in the absence of an agreement to that effect, the landlord is entitled to retain the rent so paid, though the re-entry is before the expiration of the period for which the rent was paid.' Galbraith v. Wood, supra. In Curtis v. Arnold supra, Mr. Presiding Justice Waste, speaking for the court, said:

> 'If the money be regarded as given in consideration of the covenants of the lease, when paid, the title thereto passed to the lessor (Ramish v. Workman (33 Cal. App. 19, 164 P. 26) supra; Dutton v. Christie, supra); if it is to be regarded merely as an advance payment of rent, the lessor is entitled to retain it (Galbraith v. Wood, supra . . .).'

In that case our Supreme Court denied a petition to have the cause heard in that court after judgment in the District Court of Appeal. . . .

Thus we are brought to a consideration of the proper interpretation to be placed upon the

clauses in question. Do they mean that the $700 was a deposit to secure the payment of rent and the faithful performance of the lessee's other promises, or do they mean that the $700 is to be considered as an advance payment of the rent for the last three months of the term? We think the latter interpretation expresses the true meaning of the contract. It will be recalled that in the first of appellant's covenants in which the subject of rent is mentioned he binds himself to pay the $8,400—the total rent for the whole term—'at the times and in the sums hereinafter set forth, to wit, $933.33 upon the execution and delivery of this lease,' etc.; and that of this sum, $700 'shall be credited by the lessor for the rental due upon said lease' for the last three months of the term. Here is an unequivocal covenant by the lessee to pay the total rental of $8,400 'at the times' and 'in the sums' set forth in the paragraph wherein this covenant occurs. One of the sums thus to be paid by the lessee on account of the total rental for the whole term is the sum of $933.33. That sum was to be paid immediately 'upon the execution and delivery' of the lease. Of the sum so to be paid to the lessors, $700 was to be 'credited' for 'the rental due upon said lease for the (last) three months of the full term.' There is no reason why the lessors could not or should not credit this sum of $700 upon the rentals for the last three months immediately upon their receipt of the $933.33, i. e., immediately upon the execution of the lease. And it doubtless was the intention of the parties that the money should be so immediately credited by the lessors upon its receipt by them. Nowhere in the instrument is any provision made for the repayment to the lessee of the $700, or for the repayment of any part of the $933.33 which the latter undertook to pay upon the execution of the lease. No provision is made for its repayment at any time or upon any contingency. On

the contrary, the language of this part of the lease clearly implies that all of the $933.33, including the $700 in question, was to belong absolutely to the lessors from the moment of its receipt by them. For these reasons we think it clear that the covenant which we are now analyzing, the one found in the first part of the lease, provides for and contemplates the payment of money, and not the deposit of security. That is to say, *it is a covenant by the lessee for the immediate partial performance by him of his contract to pay rent by making immediately an advance payment of the rent for the last three months of the term.*"

In Foye vs. Simpkinson, decided by the California District Court of Appeal, February 8, 1928, 264 Pac. 331, the Court uses this language:

"The determination of the appeal in this case hinges upon one point. A house lease provides:

'That for and in consideration of the payments of the rents, and the performance of the covenants contained herein, on the part of the said parties of the second part (plaintiffs and appellants), and in the manner hereinafter stated, said party of the first part does hereby lease, demise and let . . . for the term of three (3) years . . . at the monthly rent or sum of three hundred and seventy-five ($375.00) dollars, payable monthly in advance, . . . and in addition to the regular month's rent an additional sum of three hundred and seventy-five ($375.00) dollars to be credited on account of the last month's rent under this lease.'

Many months prior to the expiration date of the lease term, the parties signed the following indorsement on the lease:

'By consent of all parties hereto the foregoing

lease is hereby terminated and possession of said premises and furniture surrendered as of date of May 24, 1921.'

Plaintiffs contended in the trial court, and so contend here, that the $375 paid for the last month's rent should be returned to them. Judgment went for defendant, and plaintiffs appeal upon the judgment roll alone.

The law applicable to this case has been so often considered by the appellate courts of this state that we shall not attempt to review it here. Mr. Chief Justice Waste, when presiding justice of the First District Court of Appeal, collated the cases, and very clearly distinguished them in Curtis v. Arnold, 43 Cal. App. 97, 184 P. 510. Mr. Presiding Justice Finlayson of the Second District Court of Appeal did likewise in Wetzler v. Patterson, 73 Cal. App. 527, 238 P. 1077. Mr. Justice Waste in the above referred to case says:

'If the money be regarded as given in consideration of the covenants of the lease when paid, the title thereto passed to the lessor; if it is to be regarded merely as an advance payment of rent, the lessor is entitled to retain it.'

Mr. Justice Finlayson quotes this language with approval. Under the principles applied in these cases and numerous others cited and commented upon therein, the payment of the last month's rental in the instant case was clearly an advance payment of rent, and the lessor was and is entitled to keep it. McArthur v. Kluck, 75 Cal. App. 785, 243, P. 453; Pedro v. Potter, 197 Cal. 751, 760, 242 P. 926, 42 A. L. R. 1165. There is no element of forfeiture here, as in Parish v. Studebaker, 50 Cal. App. 719, 195 P. 721 and Jack v. Sinsheimer, 125 Cal. 563, 58 P. 130, and no element of deposit as security, as in Rez v. Summers, 34 Cal. App. 527, 168 P. 156."

Again in Pigg vs. Kelley, 268 Pac. 463, the California District Court of Appeal says:

> "The lease contained the following provision:
>
> 'Receipt is hereby acknowledged of the payment of $800.00, representing the first and last two months' rent paid in advance; $600.00 of said amount to be retained as a forfeiture by the parties of the first part of the terms of the lease are violated.'
>
> The object of this action is to recover the sum of $600 mentioned in the quoted provision of the lease. Although the plaintiffs in their complaint alleged that said sum was a payment of rent, on this appeal they contend that it was a deposit by way of security, and that since it is such security, and they have taken an assignment of the lease and agreed to perform all of the lessor's covenants, they are entitled to the security. Defendants admitted by their answer, and still contend, that this $600 was an advance payment of rent. It thus appears that there was no issue raised as to the nature of this payment —notwithstanding which, the court in its findings declared that said sum of $600 was paid as security for the faithful performance of the conditions of the lease. But since the entire lease was copied in the findings, this statement must be regarded as a mere legal conclusion, setting forth the opinion of the court as to the construction of the lease. We think the construction so adopted is erroneous. The provisions of the lease is that the $600 is 'rent paid in advance.' "

In the very recent case of Sinclair vs. Burke (Oregon Supreme Court, May 1, 1930, re-hearing denied June 17, 1930), ... Ore. ....., 287 Pac. 686, a contention similar to that of the appellee in the case at bar is thus disposed of:

"Plaintiff contends, in effect, that the $1,200 was a deposit as security for the last six months' rentals, and to be applied 'when the same shall become due and collectible' and should not be forfeited. Citing Cunningham v. Stockon, 81 Kan. 780, 106 P. 1057, 19 Ann. Cas. 212, and other similar authorities. It is agreed that the question in regard to the return of the $1,200 is one of law.

That sum was paid by plaintiff to defendants pursuant to his covenant in the lease to do so, which money was to be applied upon the last six months' rent. The money thereby became the absolute property of defendants. It was simply an absolute payment of rent in advance, as stipulated by plaintiff in the lease. It was not a deposit as security for the performance of the agreement. The statement in plaintiff's brief in regard to the $1,200 'to apply on the last six months' rental, *when the same shall become due and collectible'* contained the words, which we have underscored, that are not found in the stipulation of plaintiff in the lease.

To construe the agreement, as if it contained such language, would be making a new contract for the parties, which the court cannot do."

To the same general effect, see Forgotston vs. Brafman, 84 N. Y. Supp. 237; Phegley vs. Enke's City Dye Works, 127 Ore. 539, 272 Pac. 898, and Peebles vs. Sherman, 148 Minn. 282, 181 N. W. 715.

If it be contended by appellee that, because Jensen agreed to pay Dresher interest on the Fifteen Hundred Dollars advance payment of rent, that fact in and of itself converted the advance payment into a deposit by way of security, such contention is fully answered by the Supreme Court of Arkansas in Evans vs. McClure,

108 Ark. 531, 158 S. W. 487, which involved a lease providing:

> "Nine hundred dollars to be paid, in advance, for the last months of the term of this lease, and three hundred dollars on or before the first day of November, 1910, and the residue at the rate of three hundred dollars monthly . . . . It is understood and agreed, between the parties hereto, that, on the nine hundred dollars mentioned herein, it being an advance payment of rent, for the last three months of the term of the lease, *that the same shall bear four per cent interest, per annum, and that the interest aforesaid shall be deducted from the payment of rent falling due the first day of July, 1915.*"

Regardless of such interest provision, the court quite properly held:

> "By the express terms of the contract the $900 paid by the original lessee to the lessor was, as we have already seen, simply a payment in advance of rent, and the contract, not containing any provision that it should be paid back, it is not recoverable by the defendants."

To appellants, it seems that nothing could be plainer than the provisions of the lease here in question:

> "c. On the date of the execution and acknowledgment of this lease by the respective parties, the SECOND PARTY is to and shall pay to first party the sum of ONE THOUSAND FIVE HUNDRED ($1,500.00) DOLLARS, being, approximately, for the last eight and four-sevenths months of the five year period covered by the lease.
>
> d. The first party is to and shall pay to second party interest on said FIFTEEN HUNDRED ($1500.00) DOLLARS at the rate of ten-percent per annum, said interest payable annually, and said

> interest shall begin to run from the date the said $1,500.00 is paid to first party by second party, and shall continue in effect, *pro tanto,* until the entire $1,500.00 shall have been earned and absorbed by rent for the period to which it is made herein to pertain." (T., p. 10.)

To hold that the above language means that the Fifteen Hundred Dollars is deposited with the lessor as security for the faithful performance by the lessee of his covenants requires a twisting and straining of language. The language construes itself. The Fifteen Hundred Dollars is rent "approximately, for the last eight and four-sevenths months of the five year period covered by the lease" just as as the lease says.

The authorities cited by appellee in the court below, and which appellants assume will be by appellee presented to this tribunal do not appear to warrant the construction for which he contends.

That Cunningham v. Stockon, 81 Kans. 780, 106 Pac. 1057 is clearly distinguishable from the action here under review, is demonstrated by the following language in the opinion:

> "It is argued that the deposit was only a payment of the last year's rent, and a part performance of the contract, but it cannot be so treated, as the appellants, by dispossessing the appellee and terminating the lease before the fifth year arrived, have made it impossible to apply it on that year. When appellants took possession of the building and appropriated appellee's property in it to their own use, they effectually terminated the lease and ended the obligation of appellee under it for the remainder of the term."

In the case at bar, appellants did not elect to terminate the lease nor did they dispossess the lessee. The lease was abandoned by the trustee in bankruptcy, without any fault of appellants, notwithstanding that appellants' predecessor in interest had expended large sums of money in the construction of a special type of building for the use of the bankrupt during the lease period.

Moumal vs. Parkhurst, 89 Ore. 248, 173 Pac. 669, discloses a situation similar to that described in Cunningham vs. Stockon, *supra*. The lessor having elected to terminate the lease and dispossess the lessee is estopped to assert title to the advance rent and it must be treated as a security deposit. Then too the lease there involved is fairly susceptible of the construction by the court placed upon it, just as the Oregon Supreme Court points out:

> "For the purposes of this opinion all of the material allegations of the complaint are deemed to be true, and the question presented is whether, under the terms and provisions of the lease, the $10,000 was a deposit or an actual payment, and whether the money is to be treated as a penalty or as liquidated damages. There is no provision in the lease for a reletting of the premises by the landlord on account of the tenant for nonpayment of rent or the breach of any covenant. It is alleged that the defendants evicted plaintiff from the premises and thereby terminated the lease and plaintiff's tenancy; that defendants have been in possession ever since and have collected the rents. When used in a pleading, the word 'evicted' has a legal meaning. In an early English case the party evicted was said to be 'expelled, moved and put out'. Bouvier de-

fines 'eviction' as 'deprivation of the possession of lands or tenants,' and says:

> 'It may be fairly stated that any actual entry and dispossession, adversely and lawfully made under paramount title, will be an eviction.'

In McAdam on Landlord and Tenant (4th Ed.) vol. 2, p. 1375, it is said:

> "The term "eviction", in its primary sense, means a dispossession by legal proceedings or judicial sentence; the recovery of lands and tenements from another's possession by due course of law. The word is now used to denote any act of the landlord by which his tenant is deprived of the enjoyment of the whole or of a part of the demised premises. . . .
>
> 'An "eviction" has been defined as "any act of permanent character done by the landlord or by his procurement with the intention and effect of depriving the tenant of the enjoyment of the premises demised, or part thereof." '

The demurrer admits that the defendants evicted plaintiff and that they are now in possession and collecting the rents, and, in the absence of a provision in the lease for a reletting of the premises by the landlord for and on account of the tenant, it must be assumed that the landlord did not make his re-entry for the purpose of reletting the property and marshaling the rents for and on account of the tenant, and that such re-entry did terminate the lease. Assuming that the lease was terminated, it is the defendants' contention that the $10,000 was an actual payment by plaintiff to defendants at the time the lease was executed, and that through a failure of the plaintiff to pay rental as provided for in the lease they are now entitled to keep and retain the money as a penalty under the terms and provisions of the lease. In Cranston vs. West

Coast Life Insurance Company, 63 Or. 437, 128 Pac. 427, it is said that as usually construed 'payment' means 'a transfer of money from one person who is the payer to another who is the payee in satisfaction of a debt.' To constitute payment, therefore, money or some other valuable thing must be delivered by the debtor to the creditor for the purpose of extinguishing the debt and the debtor must receive it for the same purpose. 'Payment' is defined to be:

> 'The act of paying or that which is paid to discharge the obligation or duty; satisfaction of a claim or recompense; the fulfillment of a promise or the performance of an agreement; the discharge in money of a sum due.'

The lease provides that:

> 'The said lessees do further by these presents hereby *deposit and turn over to the lessor the sum of ten thousand dollars ($10,000.00),* the receipt of which is hereby acknowledged, *which said ten thousand dollars ($10,000.00) is to be held by said lessor* and applied in payment of the rent for the final months under this lease, and taxes for the year 1922; and *in case this lease is for any reason forfeited or declared null and void on account of any fault of the said lessees for the nonpayment of rent or otherwise, then said ten thousand dollars ($10,000.00) shall be and become the property of said lessor.* During the life of this lease, however, the said lessor shall pay to the said lessees interest on said deposit, *until the said sum is taken over by the said lessor in payment of rent* or by forfeiture, annually, at the rate of six per cent. (6%) per annum.'

The lease is for a period of ten years, the interest alone would be $600 per annum, and, upon the theory that the $10,000 was an actual payment to

the defendants at the time of the execution of the lease, the defendants would then be paying plaintiff $600 per annum as interest for the use of their own money. As we understand it, a deposit is made when one person gives to another with his consent the possession of personal property to keep for the use and benefit of the first or a third party.

Under the record we construe the lease to mean that the $10,000 was a deposit with the lessors; that the title to the money remained in the lessees, subject to the terms and conditions of the lease. The question is then presented as to whether the $10,000 is a penalty or liquidated damages."

In the instant case, there is no language in the lease fairly indicative, or even in any way intimating, that the advance rent is a deposit for lessor's security.

If the Moumal case be all that is claimed of it by appellee, certainly the later expression of the same court in Phegley vs. Enke's City Dye Works (Dec. 29, 1928) 127 Ore. 539, 272 Pac. 898 should prevail. In the case last cited, it is said:

"This brings us to the question of whether under the provisions contained in the lease plaintiffs may retain the $900 deposited with them by defendant, and at the same time maintain this action to recover the rent during the six-month period in question. Plaintiffs' contention is that the amount of the deposit was the sum fixed as liquidated damages which were stipulated to be paid upon defendant's breach of the contract, while defendant contends that the provisions for the deposit of the money are invalid because providing for a penalty. We think that neither contention is sound, but rather that the lease provides for a contractual lia-

> bility which defendant entered into upon the execution of the lease. It was stipulated that, upon the full performance of the contract by defendant, it should be credited with said sum in payment of the rent during the last four months of the terms, and that, if the conditions of the lease were broken, then the money deposited should belong to the lessors as a part of the consideration of the lease. These provisions were not in the nature of a penalty, nor did they provide for stipulated damages, although that expression was used in the lease, but rather for a forfeiture of the money upon defendant's breach of the contract."

In re Frey, 26 Fed. (2d) 472, involves a lease describing the payment as security for the payment of rent and performance of the lease and makes provision for repayment by the lessor. Almost the identical situation is described in In re Tanory, 270 Fed. 872; Alvord vs. Banfield, 85 Ore. 49, 166 Pac. 549, and Redmon vs. Graham (Cal.), 295 Pac. 1031. With these decisions appellants have no quarrel.

II. IF THE FIFTEEN HUNDRED DOLLARS WAS DEPOSITED AS SECURITY AND NOT IN PAYMENT OF RENT, THE TRUSTEE COULD NOT ABANDON THE LEASE AND RETAIN THE SECURITY. IN NO EVENT IS THE TRUSTEE ENTITLED TO MORE THAN ONE HUNDRED FIFTY DOLLARS OF SUCH SUM.

If the court determines that the Fifteen Hundred Dollars was paid as rent and not as a deposit, then it

will be unnecessary to consider the question here discussed. This proposition is argued wholly upon the assumption that the Fifteen Hundred Dollars in question was paid as security.

Upon the adjudication of O. Stanley Dresher, bankrupt, the lease dated November 30, 1928, passed to the trustee, as an asset of the said estate, and was not terminated by bankruptcy. The trustee in bankruptcy had a reasonable time, after his qualification as such trustee, to reject the lease as an asset. It is stipulated that the trustee "abandoned the lease . . . and vacated the premises the twenty-fourth day of September, 1930." (Tr., p. 5.) When the trustee abandoned the lease as an asset of the estate, it automatically and contemporaneously with such abandonment reverted to, vested in and became both an asset and a liability of O. Stanley Dresher, entirely free from all relations to his bankruptcy.

The lease continued between O. Stanley Dresher and appellants. Appellants contend that the trustee could not abandon the lease and retain property deposited by bankrupt as security for the performance of the terms thereof. Security was not provided for a period up to such time as lessee became bankrupt, *but for the entire term of the lease.* Rosenblum vs. Uber, decided by the United States Circuit Court of Appeals for the Third Circuit, April, 1919, reported in 43 A. B. R., p. 480, 256 Fed. 584, 167 C. C. A. 614.

In all the cases we have examined where security deposited for the performance of the terms of a lease has

been recovered by lessee or his trustee in bankruptcy, the lease had been terminated by the landlord or by mutual consent. We believe, as pointed out by this court in In re Sun Drug Company, 4 Fed. (2d) 843, *supra,* there is no conflict in the authorities. So far as we have been able to discover, where a lease continues, the security is always retained by the landlord.

Since, after bankruptcy, O. Stanley Dresher failed to pay rent (Tr., p. 5), the lessors had the legal right to compel him to do so and, upon his failure, to apply the Fifteen Hundred Dollars, or so much thereof as necessary, in satisfaction of the defaulted obligations of O. Stanley Dresher.

The lessors, appellants, not only had the right, but it was their duty, to minimize the loss which O. Stanley Dresher would be obligated to pay under the original lease by re-leasing the premises for the highest rent obtainable for the balance of the term of the original lease.

The original lease obligated O. Stanley Dresher to pay One Hundred Seventy-five Dollars rent monthly the first day of each month; on October 1st, 1930, the original lease had forty-one months to run before it expired and at One Hundred Seventy-five Dollars per month, the rental for the balance of the term amounts to Seventy-one Hundred Seventy-five Dollars.

Upon a re-leasing of the premises to minimize damages, the basis of rent was One Hundred Dollars per month for the first four months or Four Hundred Dollars; One Hundred Twenty-five Dollars per month for

the next five months or Six Hundred Twenty-five Dollars; the next thirty-two months at One Hundred Fifty Dollars per month or Forty-eight Hundred Dollars. The total sum, on the re-lease to minimize damages, was Fifty-eight Hundred Twenty-five Dollars. The loss, therefore, to appellants, which O. Stanley Dresher is obligated to pay and for which, for the purposes of this discussion, the Fifteen Hundred Dollars is assumed to have been given as security, is Thirteen Hundred Fifty Dollars.

It is stipulated "that said last mentioned lease was made upon the most favorable terms that Annie Jensen could obtain after using due diligence." (Tr., p. 6.)

Under the law of Arizona, in addition to the Fifteen Hundred Dollars, for the sake of argument assumed to be deposited as security, the lessor has a lien upon all of the property of the bankrupt placed upon or used in the leased premises, as security for the payment of rent to the date of bankruptcy. The statutory provision, Section 1958 of the Revised Code of Arizona of 1928, is as follows:

> "LANDLORD'S LIEN FOR RENT. The landlord shall have a lien on all the property of his tenant not exempt by law, placed upon or used on the leased premises until his rent is paid, such lien, however, shall not secure the payment of rent ensuing after the death or bankruptcy of the lessee or after an assignment for the benefit of lessee's creditors. . . . "

If we were to assume that the tenant, to whom the property was re-leased to minimize the damages, will

meet its obligations, then the difference between the rental specified in the original lease and the amount to be paid under the re-leasing is Thirteen Hundred Fifty Dollars and if the Fifteen Hundred Dollars be security, then at best there would be but One Hundred Fifty Dollars available to the trustee and the amount due appellants for rent prior to bankruptcy and for the use and occupancy of the premises after bankruptcy by the trustee should be reduced by only this amount. But this new tenant may fail to meet its obligations as O. Stanley Dresher did; consequently a disposition of what now appears to be an excess of security is premature.

For the foregoing reasons, appellants respectfully insist that the order appealed from should be reversed and the District Court directed to enter an order allowing appellants' amended claim as presented.

Respectfully submitted,

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No. 6533

United States
Circuit Court of Appeals
For the Ninth Circuit

[illegible] and CHRISTIAN JENSEN,
Appellants,

vs.

[illegible]s, Trustee in Bankruptcy of
[illegible] STANLEY DRESHER, Bankrupt,
Appellee.

BRIEF OF APPELLEE.

[illegible] From the United States District Court
[illegible] the District of Arizona.

WALTER J. THALHEIMER,
Attorney for Appellee.

TABLE OF CONTENTS.

	Page
STATEMENT OF CASE	1
POINTS AND AUTHORITIES	2
ARGUMENT	4
POINT I. It was unnecessary for the lease to contain an express statement that the Fifteen Hundred Dollars paid by the bankrupt at the time of the execution of the lease was an advancement to secure the faithful performance of the lease	4
POINT II. On the termination of the lease the trustee of the bankrupt was entitled to the return of the advancement deposited by the bankrupt as security together with accumulated interest, less so much thereof as required to make good the rent due at the time of bankruptcy and a reasonable rent during the occupancy of the premises by the trustee	6
POINT III. The entry into possession of the premises by the lessors and leasing them to another operated as a surrender and acceptance and terminated the lease	13
POINT IV. The lien of the lessor created by the statute of Arizona, if effective at all against the Fifteen Hundred Dollars deposited as security, is only to the extent of rentals due and unpaid prior to the lessee's bankruptcy	15
CONCLUSION	15

TABLE OF CASES AND AUTHORITIES.

Statutes Cited.

	Page
Arizona, Sec. 1958, Revised Code, 1928	4-15

Cases Cited.

Alvord vs. Banfield, 85 Ore. 49, 166 Pac. 549	3- 7
American Law Reports, Vol. 1, 18 p. 960	3-14
Carstens vs. McLean, 7 Fed. (2d) 322	3- 7
Casino Amusement Co. vs. Ocean Beach Amusement Co., 133 So. 559	9
Cunningham vs. Stockton, 81 Kas. 780, 106 Pac. 1057, 19 Ann. Cas. 212	2-3-5-7-9-12
Electric Appliance Co. vs. Ellis, 4 Fed. (2d) 108	3-14
Evans vs. McClure, 108 Ark. 531, 158 S. W. 487	12
Foye vs. Simpkinson, 89 Cal. Ap. 119, 264 Pac. 331	11
Frey, In Re, 26 Fed. (2d) 472	3-7-13
Galbraith vs. Wood, 124 Minn. 210, 144 N. W. 945, 50 L. R. A. (N. S.) 1034	9
Harvey vs. Weisbaum, 159 Cal. Ap. 265, 113 Pac. 656, 33 L. R. A. (N. S.) 540	10
Kastner vs. Campbell, 6 Ariz. 145, 53 Pac. 586	3-14
Manchester Marble Co. vs. Rutledge R. Co., 100 Vt. 232, 136 Atl. 394, 51 A. L. R. 628	2- 6
Millard's Inc., In Re, 41 Fed. (2d) 498	3- 8
Moumal vs. Parkhurst, 89 Ore. 248, 173 Pac. 669	2-3-5-7-11
Phegley vs. Enke's City Dye Works, 127 Ore. 539, 272 Pac. 898	11-12
Pigg vs. Kelley, 92 Cal. Ap. 329, 268 Pac. 463	11
Redmond vs. Graham (Calif. 1931) 295 Pac. 1031	2- 6
Rosenblum vs. Uber, 43 Am. B. R. 480, 256 Fed. 584	14
Ruling Case Law, Vol. 16, p. 698-700	2- 6
Ruling Case Law, Vol. 16, p. 931	2- 6
Sherwood's Inc., In Re, 210 Fed. 754, Ann. Cas. 1916 A, p. 940	3-7-8-13
Sinclair vs. Burke, 133 Ore. 115, 287 Pac. 686	11
Sun Drug Co. In Re, 4 Fed. (2d) 843	3-7-8
Tanory In Re, 270 Fed. 872	3- 7
Welcome vs. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. S. R. 145	3-13
Wetzler vs. Patterson, 73 Cal. Ap. 527, 238 Pac. 1077	10
Willis vs. Kranendonk, 58 Utah 592, 200 Pac. 1025, 18 A. L. R. 947	3-14
Yodleman-Walsh Foundry Co. In Re, 166 Fed. 381	3- 8

No. 6533

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANNIE JENSEN and CHRISTIAN JENSEN,
Appellants,

vs.

T. J. SPARKES, Trustee in Bankruptcy of O. STANLEY DRESHER, Bankrupt,
Appellee.

BRIEF OF APPELLEE.

Upon Appeal From the United States District Court for the District of Arizona.

STATEMENT OF THE CASE.

The facts involved are fully set forth in the agreed statement of the case (Tr. Record, p. 3-7) and are substantially as stated in the brief of the appellants.

An additional fact, not given in appellants' brief, to which the appellee believes it desirable to call attention is that the appellee was appointed trustee in bankruptcy of O. Stanley Dresher, bankrupt, on August 21, 1930 (Trans. Record, p. 4) one month and three days prior to the abandonment of the lease and vacating of the premises, namely, September 24, 1930, (Trans. Record, p. 5).

POINTS AND AUTHORITIES.

I.

It was unnecessary for the lease to contain an express statement that the Fifteen Hundred Dollars paid by the bankrupt at the time of the execution of the lease was an advancement to secure the faithful performance of the lease.

Cunningham vs. Stockton, 81 Kas. 780, 106 Pac. 1057, 19 Ann. Cas. 212;

Moumal vs. Parkhurst, 89 Ore. 248, 173 Pac. 669;

Redmond vs. Graham (Calif. 1931), 295 Pac. 1031;

Manchester Marble Co. vs. Rutledge R. Co., 100 Vt. 232, 136 Atl. 394, 51 A. L. R. 628;

16 Ruling Case Law 698-700;

16 Ruling Case Law 931.

II.

On the termination of the lease the trustee of the bankrupt was entitled to the return of the advancement deposited by the bankrupt as security together with accumulated interest, less so much thereof as re-

quired to make good the rent due at the time of bankruptcy and a reasonable rent during the occupancy of the premises by the trustee.

In Re Sherwoods Inc., 210 Fed. 754 Ann. Cas. 1916 A, p. 940;

In Re Sun Drug Co., 4 Fed. (2d) 843;

In Re Tanory, 270 Fed. 872;

In Re Frey, 26 Fed. (2d) 472;

Carstens vs. McLean, 7 Fed. (2d) 322;

Alvord vs. Banfield, 85 Ore. 49, 166 Pac. 549;

Cunningham vs. Stockton, 81 Kas. 780, 106 Pac. 1057, 19 Ann. Cas. 212;

Moumal vs. Parkhurst, 89 Ore. 248, 173 Pac. 669;

In Re Millard's Inc., 41 Fed. (2d) 498;

In Re Yodleman-Walsh Foundry Co., 166 Fed. 381.

III.

The entry into possession of the premises by the lessors and leasing them to another operated as a surrender and acceptance and terminated the lease.

In Re Frey, 26 Fed. (2d) 472;

In Re Sherwoods Inc., 210 Fed. 754, Ann. Cas. 1916 A, p. 940;

Welcome vs. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. S. R. 145;

Willis vs. Kranendonk, 58 Utah 592, 200 Pac. 1025, 18 A. L. R. 947;

Kastner vs. Campbell, 6 Ariz. 145, 53 Pac. 586;

Note: 18 A. L. R. 960;

Electric Appliance Co. vs. Ellis, 4 Fed. (2d) 108.

IV.

The lien of the lessor created by the statute of Arizona, if effective at all against the Fifteen Hundred Dollars deposited as security, is only to the extent of rentals due and unpaid prior to the lessee's bankruptcy.

Sec. 1958 Revised Code of Arizona, 1928.

ARGUMENT.

I.

It was unnecessary for the lease to contain an express statement that the Fifteen Hundred Dollars paid by the bankrupt at the time of the execution of the lease was an advancement to secure the faithful performance of the lease.

The manifest meaning and intent of the parties was that title to the Fifteen Hundred Dollars remained in the bankrupt, that the same was deposited with the lessor to be held in trust as security until the last eight and four-sevenths months of the leasehold term and was then to be applied as "earned and absorbed" on the payment of the rent accruing in and during such last eight and four-sevenths months.

> "The lease did not contain an express statement that the money advanced should constitute a deposit to insure performance by appellee, but the advancement of so large an amount, the payment of the same before the construction of the building was be-

gun, and about six months before possession could be obtained, and the provision that the amount advanced should be applied on the rental for the last year of the term, clearly indicate that it was a deposit to insure performance."

Cunningham vs. Stockton, 81 Kans. 780, 106 Pac. 1057, 19 Ann. Cas. 212.

The payment of interest on the advancement is in itself inconsistent with the contention that title passed to the lessor. As is said by the Court in Moumal vs. Parkhurst, 89 Ore. 248, 173 Pac. 669:

"The lease is for a period of ten years, the interest alone would be $600.00 per annum, and, upon the theory that the $10,000 was an actual payment to the defendants at the time of the execution of the lease, the defendants would then be paying plaintiff $600 per annum as interest for the use of their own money. As we understand it, a deposit is made when one person gives to another with his consent the possession of personal property to keep for the use and benefit of the first or a third party.

Under the record we construe the lease to mean that the $10,000 was a deposit with the lessors; that the title to the money remained in the lessees, subject to the terms and conditions of the lease; and that it was not an actual payment to the lessors at the time of the execution of the lease."

"This is in no sense an advance payment of the rent for that period. Until the end of the term, the

money is held as security; and until that time it is uncertain whether the money shall be applied on rent. This interpretation is strengthened by the further provision that the $5400 should be returned to the lessee upon the accidental destruction of the premises. This is, of course, wholly inconsistent with an absolute payment in advance, with title passing to the lessor."

Redmond vs. Graham, (Calif. 1931), 295 Pac. 1031.

In construing the lease the construction favorable to the lessee should be adopted.

"The construction contended for by the defendant would do violence to the rule that a deed or lease will be most strongly construed against the grantor or lessor. (Citations.) It would likewise be against the rule that a contract should be strictly construed against the party who framed and wrote it."

Manchester Marble Co. vs. Rutland R. Co., 100 Vt. 232, 136 Atl. 394, 51 A. L. R. 628;

16 Ruling Case Law 698-700;

16 Ruling Case Law 931.

II.

On the termination of the lease the trustee of the bankrupt was entitled to the return of the advancement deposited by the bankrupt as security together with accumulated interest, less so much thereof as required to make good the rent due at the time of bankruptcy and a reasonable rent during the occupancy of the premises by the trustee.

"The right of the lessee in the money which he had deposited with the lessor was to receive back with accumulated interest from the lessor upon the termination of the lease so much of the deposit as was not needed to make good defaults upon the covenants, and upon the bankruptcy of the lessee, this right passed to the trustee."

In Re Sherwoods, Inc., 210 Fed. 754, Ann. Cas. 1916 A, p. 940.

"If the $5000 paid by the lessee at the time of executing the lease was a mere advancement to secure the faithful performance of the covenants of the lease, the lessee or his successor in interest was entitled to a return of the money thus advanced, upon the determination of the lease, less the amount of any rent due and unpaid at the time of such determination."

In Re Sun Drug Company, 4 Fed. (2d) 843;

In Re Tanory, 270 Fed. 872;

In Re Frey, 26 Fed. (2d) 472;

Carstens vs. McLean, 7 Fed. (2d) 322;

Alvord vs. Banfield, 85 Ore. 49, 166 Pac. 549;

Cunningham vs. Stockton, 81 Kans. 780, 106 Pac. 1057, 19 Ann. Cas. 212;

Moumal vs. Parkhurst, 89 Ore. 248, 173 Pac. 669.

The rent for which the trustee is liable for use and occupancy of the premises is a reasonable amount.

"It is well settled that upon the bankruptcy of the tenant, provided this does not by the express terms

of the lease terminate the tenancy, the leasehold interest passes to the trustee in bankruptcy if he elects to accept it. He has a reasonable time within which the lease may be accepted. If in the meanwhile he occupies the premises, he is liable for merely the reasonable rent while so occupying, and not for the rent stipulated in the lease itself."

In Re Sherwoods, Inc., 210 Fed. 754, Ann. Cas. 1916 A, p. 940;

In Re Millards Inc., 41 Fed. (2d) 498;

In Re Yodleman-Walsh Foundry Co., 166 Fed. 381.

The lease in re Sun Drug Company (supra), also cited by appellants as sustaining their position, provided:

"Now, therefore, in consideration of the sum of $5,000 in cash and the promissory note of the lessee in favor of the lessor due April 15, 1923, in the sum of $1600 the receipt of said cash and note being hereby acknowledged by the lessor, and IN FURTHER CONSIDERATION OF THE RENTALS HEREIN RESERVED * * *."

It will be observed that the money paid and the note given were specifically in consideration of the execution of the lease and that no element of deposit as security was concerned; as the Court said:

"The contract by its terms leaves no room for construction. The money was not to be applied on rents to accrue in the future or for any other purpose, and not to be returned to the lessee in any event or upon any contingency. The payment was as absolute and

as unconditional as if made for any other interest in the premises and the money when paid became the absolute property of the lessor free from any claim on the part of the lessee or the trustee in bankruptcy."

The case of Galbraith vs. Wood, 124 Minn. 210, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, cited by appellants as supporting their contentions, concerned an advance payment of rental solely and contained nothing in pleading or evidence relative to any deposit for security and as the Court said:

"While the $20,000 may be in fact have been paid as security, as it may in fact have been paid as a consideration to remove an obstacle that arose in the negotiations for the lease, on the pleadings and evidence we must and do hold that it was what the pleadings and evidence call it, an advance payment of rent."

In Casino Amusement Company vs. Ocean Beach Amusement Company, 133 S. 559, the Court itself points out that it is to be distinguished from Cunningham vs. Stockton and like cases, saying:

"The general rule deducible from the authorities is that, in the absence of provision therefor, rents paid in advance cannot be recovered by the tenant upon termination of the lease, unless such termination was wrongful against him. (Citations.) In this respect there is a difference between an advance payment of rent and a mere deposit or security for performance such as were involved in Cunningham vs.

Stockton, supra, and other authorities cited by plaintiff in error."

Harvey vs. Weisbaum, 159 Cal. 265, 113 Pac. 656, 33 L. R. A. (N. S.) 540, cited by appellants, was solely an action to recover an advance payment of rent because of destruction of the premises by fire. As the Court said:

> "The question and the only question that need be decided, is as to whether or not a tenant, who has taken possession of the leased premises and paid his rent, or a part of it, in advance, as required by the terms of the lease, can, in the absence of any covenant in the lease, recover the rent so paid in case of the total destruction of the premises by fire without any fault of either party to the lease."

In Wetzler vs. Patterson, 73 Cal. Ap. 527, 238 Pac. 1077, another citation of appellants, the Court points out that the character of the payment is dependent on the intention of the parties and in deciding that the intention was that the payment there involved was an advance payment of rent, says:

> "There is no reason why the lessors could not or should not credit this sum of $700 upon the rentals for the last three months immediately upon their receipt of the $933.33 i. e., immediately upon the execution of the lease. And it doubtless was the intention of the parties that the money should be so immediately credited by the lessors upon its receipt by them. No where in the instrument is any provision made for the repayment to the lessee of the $700, or for

the repayment of any part of the $933.33 which the latter undertook to pay upon the execution of the lease. No provision is made for its repayment at any time or upon any contingency. On the contrary, the language of this part of the lease clearly implies that all of the $933.33, including the $700 in question, was to belong absolutely to the lessors from the moment of its receipt by them. For these reasons we think it clear that the covenant which we are now analyzing, the one found in the first part of the lease, provides for and contemplates the payment of money, and not the deposit of security. That is to say, it is a covenant by the lessee for the immediate partial performance by him of his contract to pay rent by making immediately an advance payment of the rent for the last three months of the term."

Foye vs. Simpkinson, 89 Cal. Ap. 119, 264 Pac. 331, and Pigg vs. Kelley, 92 Cal. Ap. 329, 268 Pac. 463, other citations of appellants, also involved leases where the payments were clearly advance payments of rent and not capable of being construed otherwise.

The appellants' contention that a different rule has been adopted in Oregon than that expressed in Moumal vs. Parkhurst (supra) does not seem to be borne out by Sinclair vs. Burke, 133 Ore. 115, 287 Pac. 686 and Phegley vs. Enke's City Dye Works, 127 Ore. 539, 272 Pac. 898 (cited by appellants). In Sinclair vs. Burke (supra) no element of deposit was involved, the Court saying, as also shown in appellants' brief:

"That sum was paid by plaintiff to defendants pursuant to his covenant in the lease to do so, which

> money was to be applied on the last six months' rent. The money thereby became the absolute property of defendants. It was simply an absolute payment of rent in advance, as stipulated by plaintiff in the lease. It was not a deposit as security for the performance of the agreement. The statement in plaintiff's brief in regard to the $1200 'to apply on the last six months' rental, when the same shall become due and collectible' contained the words which we have underscored, that are not found in the stipulation of plaintiff in the lease."

and in Phegley vs. Enke's City Dye Works (supra) the Court said:

> "That the money was not deposited as security for the payment by defendant of the rent is also clear. If it had been, defendant would be entitled to a return of the sum deposited, less the amount of rent due and unpaid at the time of the termination of the lease."

In Evans vs. McClure, 108 Ark. 531, 158 S. W. 487, cited by appellants, the Court pointed out that the facts involved were essentially different from those in Cunningham vs. Stockton (supra) and stated, as set forth in appellants' brief:

> "By the express terms of the contract the $900 paid by the original lessee to the lessor was, as we have already seen, simply a payment in advance of rent, and the contract, not containing any provision that it should be paid back, it is not recoverable by the defendants."

III.

The entry into possession of the premises by the lessors and leasing them to another operated as a surrender and acceptance and terminated the lease.

The acceptance by the landlord of a surrender by the tenant's trustee terminated the lease.

In Re Frey, 26 Fed. (2d) 472.

> "The making of the new lease by the lessor during the existence of an outstanding lease, the tenant under the original lease giving up his possession to the stranger, operates as a surrender by operation of law. (Citations.)."

In Re Sherwoods' Inc., 210 Fed. 754, Ann. Cas. 1916 A, p. 940.

It will be noted that the trustee vacated the premises and that the appellants took possession without any qualification that it was for the benefit of the estate and that the leasing of the same to another for a longer period than the remainder of the Dresher lease was appellants independent act. As is said in Welcome vs. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. S. R. 145;

> "In taking possession, the landlord did not announce his intention to continue to hold the tenants. He relet without notifying the defendants that he should do so on their account. He relet for a period longer than the remainder of their term, thus showing plainly that he was acting in his own right, and not as their self-constituted agent. Under such cir-

cumstances, he cannot say that he did not accept the surrender."

"As pointed out in the case cited from California, where a tenant abandons the premises, and the landlord unconditionally goes into possession thereof and treats them as though the tenancy had expired, it amounts to a surrender, and the landlord cannot thereafter recover any rent, or sue for damages."

Willis vs. Kranendonk, 58 Utah 592, 200 Pac. 1025, 18 A. L. R. 947;

Kastner vs. Campbell, 6 Ariz. 145, 53 Pac. 586;

Note: 18 A. L. R. 960.

In Rosenblum vs. Uber, 43 Am. B. R. 480, 256 Fed. 584, cited by appellants, the Pennsylvania statute under which it was decided gave to the landlord priority for one year's rent and the landlord in accepting possession from the trustee expressly did so for the benefit of the estate. As is said in Electric Appliance Company vs. Ellis a decision of the same Court reported in 4 Fed. (2d) 108.

"The parties in the Rosenblum case acted under an agreement, in that the qualified offer of the landlord in taking possession was accepted by the trustee. Here the qualified offer of the landlord was unqualifiedly rejected by the trustee and the subsequent taking of possession and occupation of the premises by the landlord was his own independent act."

IV.

The lien of the lessor created by the statute of Arizona, if effective at all against the Fifteen Hundred Dollars deposited as security, is only to the extent of rentals due and unpaid prior to the lessee's bankruptcy.

Section 1958 of the Revised Code of Arizona, 1928, provides:

> "The landlord shall have a lien on all the property of his tenant not exempt by law, placed upon or used on the leased premises until his rent is paid, such lien, however, shall not secure the payment of rent ensuing after the death or bankruptcy of the lessee * * * ."

It will be observed that the lien given extends only to non-exempt property of the tenant placed upon or used on the leased premises and then only for rent due prior to bankruptcy. Nothing in the statute warrants the conclusion of appellants that any lien is given on the deposit for security, moreover there is no denial on the part of the trustee to the right of appellants to rentals due and unpaid prior to bankruptcy.

CONCLUSION.

The appellee has herein presented the aspects of this appeal from his viewpoint and has endeavored, either directly or indirectly, to answer every point made in appellants' brief. Whatever remains in the way of applying the points and authorities of the appellee to appellants'

contentions and distinguishing the authorities relied upon by them, must be left to the reasoning of the Court with such assistance as appellee may be able to render on oral argument.

In conclusion, the appellee respectfully submits that the provisions of the lease and the surrounding circumstances clearly show that the deposit made by the bankrupt was to insure the faithful performance of the lease; that the lease was terminated on the appellants' entry into possession and leasing to another for their own benefit and that upon such termination the appellee as trustee and successor in interest of the bankrupt became entitled to the deposit. For these reasons the appellee respectfully asks the Court to affirm that portion of the Order appealed from by the appellants.

Respectfully submitted,

WALTER J. THALHEIMER,
Attorney for Appellee.

No. 6535

United States

Circuit Court of Appeals

For the Ninth Circuit.

7

In the Matter of RENFRO–WADENSTEIN, a Corporation, and RENFRO–WADENSTEIN FURNITURE COMPANY, a Corporation, Bankrupts.

WALTER S. OSBORN, as Trustee in Bankruptcy for RENFRO–WADENSTEIN, a Corporation, and RENFRO–WADENSTEIN FURNITURE COMPANY, a Corporation, Bankrupts,

Appellant,

vs.

KETCHAM & ROTHSCHILD, INC., a Corporation, and ROBERT W. IRWIN COMPANY, a Corporation,

Appellees,

and

KETCHAM & ROTHSCHILD, INC., a Corporation,

Cross-Appellant,

vs.

WALTER S. OSBORN, as Trustee in Bankruptcy for RENFRO–WADENSTEIN, a Corporation, and RENFRO–WADENSTEIN FURNITURE COMPANY, a Corporation, Bankrupts,

Cross-Appellee,

and

ROBERT W. IRWIN COMPANY, a Corporation,

Cross-Appellant,

vs.

WALTER S. OSBORN, as Trustee in Bankruptcy for RENFRO–WADENSTEIN, a Corporation, and RENFRO–WADENSTEIN FURNITURE COMPANY, a Corporation, Bankrupts,

Cross-Appellee.

Transcript of Record.

Upon Appeal and Cross-Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer of Trustee to Petition of Reclamation of Robert W. Irwin Company	132
Answer of Trustee to Petition of Reclamation of Ketcham & Rothschild, Inc.	155
Assignment of Errors of Petitioner Robert W. Irwin Company, a Corporation	252
Assignment of Errors of Petitioner Ketcham & Rothschild, Inc., a Corporation	260
Assignment of Errors of W. S. Osborn, Trustee	268
Certificate of Clerk U. S. District Court to Transcript of Record	300
Certificate of Review	1
Citation on Appeal (Robert W. Irwin Co.)	302
Citation on Appeal (Ketcham & Rothschild, Inc.)	304
Citation on Appeal (W. S. Osborn, Trustee)	305
Cost Bill of Petitioners Robert W. Irwin Company, a Corporation, and Ketcham & Rothschild, Inc., a Corporation	248

Index.

Page

Cost Bill of Trustee W. S. Osborn in Reclamation Proceedings of Irwin & Co. and Ketcham & Rothschild 245
Cost Bond on Appeal (Robert W. Irwin Co.).. 256
Cost Bond on Appeal (Ketcham & Rothschild, Inc.) 264
Counter-praecipe of Trustee on Cross-appeal of Petitioners 296
Decision 222

EXHIBITS:

Petitioner's Exhibit No. 1 Attached to Petition for Reclamation of Ketcham & Rothschild, Inc.—Agreement Dated March 30, 1928, Between Ketcham & Rothschild, Inc., and Renfro-Wadenstein. 144
Petitioner's Exhibit No. 1 Attached to Petition of Robert W. Irwin Company—Agreement Dated April 1, 1928, Between Robert W. Irwin Company and Renfro-Wadenstein 112
Petitioner's Exhibit No. 2 Attached to Petition for Reclamation of Ketcham & Rothschild, Inc.—Bill of Sale, Renfro-Wadenstein to Ketcham & Rothschild, Inc. 148
Petitioner's Exhibit No. 2 Attached to Petion of Robert W. Irwin Company—Bill of Sale, Renfro-Wadenstein to Robert W. Irwin Company 117

Index.

Page

EXHIBITS—Continued:

Petitioner's Exhibit No. 3 Attached to Petition for Reclamation of Ketcham & Rothschild, Inc.—List of Merchandise Shipped by Ketcham & Rothschild, Inc., to Renfro-Wadenstein .. 152

Petitioner's Exhibit No. 3 Attached to Petition of Robert W. Irwin Company—List of Merchandise and Furniture.... 122

Exceptions of Robert W. Irwin Company to Findings of Referee 163

Exceptions of Ketcham & Rothschild to Findings of Referee 165

Findings of Fact..... 84

Memorandum Decision of Referee..... 191

Names and Addresses of Counsel of Record.... 1

Order Allowing Appeal..... 267

Order Allowing Appeal (Robert W. Irwin Co.). 255

Order Allowing Appeal (Ketcham & Rothschild, Inc.) 263

Order Authorizing Clerk to Transmit Exhibits. 284

Order Denying Petition in Reclamation of Robert W. Irwin, etc..... 171

Order Denying Petition in Reclamation of Ketcham & Rothschild..... 176

Order Diverting Sale to Robert Grass Conformably to His Written Bid..... 186

Order Fixing Statement of Evidence..... 280

Order of Referee Denying Petition in Reclamation of Robert W. Irwin Company..... 161

Index. Page

Order of Referee Denying Petition in Reclamation of Rothschild & Ketcham, Incorported 162
Order Re Printing of Exhibits..... 308
Order upon Petitions for Review of Robert W. Irwin Company, a Corporation, and Ketcham & Rothschild, Inc., a Corporation..239, 242
Petition for Allowance of Appeal to Circuit Court of Appeals..... 266
Petition for Appeal of Robert W. Irwin Company 250
Petition for Appeal of Ketcham & Rothschild, Inc. 258
Petition for Reclamation of Robert W. Irwin Company 107
Petition for Reclamation of Ketcham & Rothschild, Inc..... 138
Petition of Robert W. Irwin Company for Review of Referee's Order..... 166
Petition of Ketcham & Rothschild Company for Review of Referee's Order..... 172
Praecipe of Robert W. Irwin Company for Transcript of Record..... 285
Praecipe of Ketcham & Rothschild, Inc., for Transcript of Record..... 288
Praecipe of Trustee on Appeal and Counter-Praecipe of Trustee on Petitioner's Cross-appeal 293
Referee's Memorandum Decision..... 191
Reply of Robert W. Irwin Company to Answer of Trustee..... 136
Reply of Ketcham & Rothschild, Inc., to Answer of Trustee 159

Index. Page

Stipulation as to Merchandise and Accounts Receivable and Proceeds Thereof Claimed by Ketcham & Rothschild, Inc. and Robert W. Irwin Company 183
Stipulation as to Statement of Evidence on Appeal 274
Stipulation as to Trustee's Assignment of Error 271
Stipulation Consolidating Appeals and Providing for One Transcript of Record..... 282
Stipulation Re Deposition of Robert W. Irwin. 182
Stipulation Re Petitions for Reclamation, etc.. 177
Stipulation Re Printing of Exhibits..... 309
Stipulation Waiving Supersedeas Bond..... 281
Summary of Evidence 2
Supplemental Praecipe of Petitioners and Cross-Appellants, Robert W. Irwin Company and Ketcham & Rothschild, Inc..... 299
Supplemental Praecipe of Trustee on Appeal.. 297

TESTIMONY ON BEHALF OF TRUSTEE:
BAILEY, C. H..... 82
EDRIS, WILLIAM 79
HOFFMAN, A. WILLIAM 72

TESTIMONY ON BEHALF OF PETITIONERS:
HILLS, S. T. 73
IRWIN, ROBERT W. 2
MORGAN, TRUMAN B. 71
ROTHSCHILD, EMIL 18
SMITH, HERBERT E. 65
WADENSTEIN, O. A. 35

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POE, FALKNOR, FALKNOR & EMORY, 977–80 Dexter Horton Bldg., Seattle, Washington.

For W. S. OSBORN, Trustee of the Estate of the Bankrupt Corporations:

EGGERMAN & ROSLING, 1824–26 Exchange Building, Seattle, Washington.

In the District Court of the United States for the Western District of Washington, Northern Decision.

IN BANKRUPTCY—No. 9085.

In the Matter of RENFRO–WADENSTEIN, a Corporation, and RENFRO–WADENSTEIN FURNITURE COMPANY, a Corporation,

Bankrupts.

CERTIFICATE ON REVIEW.

I, Ben L. Moore, the Referee in Bankruptcy in charge of this proceeding, do hereby certify:

That in the course of the proceeding the question arose whether petitioners Robert W. Irwin Company and Ketcham & Rothschild Company,

claiming as consignors to have furnished certain merchandise to the bankrupt corporation on consignment, were entitled to recover from the trustee in bankruptcy (1) certain merchandise in the possession of the Trustee, (2) certain accounts receivable (and the proceeds thereof) in the hands of the Trustee, representing sales made by the bankrupts prior to bankruptcy of certain furniture alleged to belong to petitioners as consignors, and (3) certain cash in the hands of the Trustee received by him from S. T. Hills, as assignee for the benefit of creditors.

The petitions were separate but were heard at the same time on the same evidence.

An order was entered denying both petitions, and in due time petition to review said order was filed herein.

SUMMARY OF EVIDENCE.

TESTIMONY OF ROBERT W. IRWIN, FOR PETITIONERS.

ROBERT W. IRWIN, a witness on behalf of petitioners, testified in substance as follows:

I am president of Robert W. Irwin Company, of Grand Rapids, Michigan, which at the time of the execution of the consignment agreement was operating two furniture plants, one called the Royal and the other the Phoenix. The Royal plant turned out higher grade furniture than the Phoe-

(Testimony of Robert W. Irwin.)

nix. (Dep., p. 13.) For about two to [2*] five years prior to April 1, 1928, we had been selling furniture of our manufacture on open account to Renfro-Wadenstein Co. (hereinafter called Dealer). (Deposition, p. 3.)

The Dealer had become very much in arrears in the payments on its account, and as a result of our efforts to get the accounts in proper shape, Mr. Wadenstein, president of the Dealer, went to Grand Rapids in November, 1927. At that time the Dealer owed us approximately $20,000.00, of which approximately $8,000.00 was for goods shipped during the year 1927 and the balance was for goods shipped prior to 1927. (Deposition, p. 4.)

Mr. Wadenstein proposed to liquidate the account by paying $2,000.00 a month commencing in November, and to try and work out some plan in the spring, before the removal of the Dealer to its new store, whereby we would be justified in extending credit for goods for the new store. (Deposition, pp. 4, 5.)

The Dealer made two payments,—one of $2,000 in November, 1927, and one of $2,000 in December, but made no other payments until some time in April after the consignment agreement was made. (Deposition, p. 5.)

In March, 1928, we received an order from the Dealer, through our traveling salesman, Mr. Ferris, for over $15,000.00 of goods. I wired them upon

*Page-number appearing at the foot of page of original certified Transcript of Record.

(Testimony of Robert W. Irwin.)

receipt of that order that we would not be able to ship until further payments had been made. (Deposition, p. 5; Petitioner's Ex. 14 and 15.)

About this time, in March, I had a conference about this matter, in New York, with Mr. Jack Rothschild, president of Ketcham & Rothschild, whose situation with reference to the extension of credit to the Dealer was about the same as ours. (Deposition, p. 8.)

I had a second conference with Mr. Rothschild in Grand Rapids, where he came to see me about this because he was going to Seattle. In this conference I suggested to Mr. Rothschild that [3] if agreeable to the Dealer, we might consent to enter into a consignment contract. With that in mind I drafted a form of contract and gave it to Mr. Rothschild, authorizing him to act in our behalf in negotiating for some arrangement, subject, however, to our final approval. (Deposition, p. 6.)

Mr. Rothschild went to Seattle, where he arrived in March, 1928. (Deposition, pp. 6, 16.)

About March 27th or 28th, I received the letter from Renfro dated March 23d, 1928 (Petitioner's Ex. 26), and enclosed with it the contract (Petitioner's Ex. 27). (Deposition, p. 17.) When the two copies of the contract were thus received by me they had been executed by the Dealer but the date was blank. I wrote the date April 1, 1928, in the contract and immediately executed it on behalf of my company. (Deposition, pp. 17, 19.) I retained both copies of the contract in my possession

until September 5, 1928, when I sent one of these copies back to the Dealer. (Deposition, pp. 44, 61, 84.)

(Note on Petitioner's Exhibits 26 and 27: Exhibit 27 is the so-called consignment contract. It bears date April 1, 1928, and provides that Robert W. Irwin Co., therein named as first party, shall furnish goods to Renfro-Wadenstein Co., named as second party therein, on the terms and conditions therein set forth.

Paragraph nine of this contract recites and provides, in substance, that Renfro-Wadenstein has in its possession certain goods "as per attached list" which had heretofore been sold and delivered to it by Robert W. Irwin Co. on credit and had not been paid for; that the title to said goods "is hereby transferred and conveyed back" to petitioner and shall hereafter be treated as having been delivered to Renfro-Wadenstein "on consignment and under and subject to [4] all of the terms and conditions of this contract"; and that in consideration of said transfer and conveyancce of the title of said goods back to the Robert W. Irwin Co. "that company (the Irwin Co.) does hereby cancel" the indebtedness of Renfro-Wadenstein for said goods.

Exhibit 26 is the letter of March 23d, 1928, written by Renfro-Wadenstein. It refers in particular to paragraph 9 of the contract and provides that Renfro-Wadenstein will furnish,

(Testimony of Robert W. Irwin.)

shortly after the first of the month, an inventory of the Irwin Company's merchandise on hand, and will also furnish a "bill of sale which will act as a transfer back to your company of this merchandise" and that any difference in the amount of the account will be taken care of in three equal payments, thirty, sixty and ninety days.)

The bill of sale referred to in the letter of March 23, 1928, was not finally executed by the Dealer until August 6, 1928, and was received through the mail by us on about August 10th or 11th. (Deposition, p. 23; Petitioner's Ex. 28.) This was never filed for record. (Petitioner's Ex. 28.)

Between April 1, 1928 (the date of the agreement), and August 6, 1928 (the date of the list or bill of sale), correspondence was taking place between our company and Renfro-Wadenstein endeavoring to get a correct list that we were willing to accept. (Deposition, p. 23.)

On April 28, 1928, the Dealer sent us an inventory or bill of sale of the goods of our make in its hands on April 27th. (Petitioner's Ex. 36.) This included more goods in value than the amount they owed us. On May 4th I wrote them a letter calling their attention to this fact, stating that the bill of sale was not in accordance with out understanding; suggesting that they retain title to all the Phoenix merchandise "and as much of [5] the Royal as will leave the balance the amount of our account less the cash payments which it was arranged with

(Testimony of Robert W. Irwin.)

Mr. Rothschild that you will make"; and saying further, "Please have the bill of sale corrected in this manner and return it to us and we will forward the consignment arrangement as arranged for with Mr. Rothschild." (Petitioner's Ex. 38; Deposition, pp. 6, 31, 32.)

On May 22 the Dealer wrote to us saying, "We are also enclosing a sixty and ninety day note for the amount of the Phoenix account and will treat this as a separate item, leaving the bill of sale in force on the Robert W. Irwin line, if this will be satisfactory to you." (Deposition, p. 33, Ex. 40.)

On June 4, 1928, I wrote to the Dealer as follows: "The notes that you enclose are satisfactory as payment on the new deal but the bill of sale of the Royal goods should be reduced to represent the amount of your debit balance, after deducting these two notes." . . . . "We cannot see our way clear to take back title to more of the Royal merchandise than this account represents. We are enclosing herewith a list of items amounting to $14,490.45, which we suggest you convey to us by the bill of sale, and this will clear the records under the new arrangement." . . . . "Please have the bill of sale made out in this manner and send to us, and we will send you promptly the consignment contract." (Deposition, p. 36; Petitioner's Ex. 43.)

On July 24, 1928, I wrote to the Dealer as follows: "We have had no reply to our letter of June 4. We feel that this matter should be put in final form

(Testimony of Robert W. Irwin.)

without further delay. We returned to you the bill of sale and in our letter of June 4 gave you the list of items the title of which, according to our books, should be included in the bill of sale. What about the settlement for the sales which you have made since this arrangement really became effective? So far we have had no report of sales, [6] with settlements, according to the terms of the contract. . . . . " (Petitioner's Ex. 46; Dep., p. 39.)

Under the April 1st agreement when the Dealer sold this consigned furniture, it was to have made a cash remittance, and if unable to make a cash remittance to give us a demand note collateraled by accounts receivable. On August 4, 1928, the Dealer wrote us a letter enclosing us a report of sales with two notes in settlement of the goods sold under the April 1st contract. (Petitioner's Ex. 48; Dep., pp. 41, 40.)

This was the first and only payment or attempt to make payment of any kind under the April 1st agreement. (Dep., p. 41.)

On August 11, 1928, my company wrote the Dealer acknowledging receipt of its sale report of August 4, and said "This mode of settlement is not exactly in accordance with the stipulations of the agreement, covering the settlement of merchandise sold from the special account. In taking this matter up with Mr. Irwin he feels that inasmuch as we are furnishing the merchandise, we should receive cash settlement for all sales. However, in this instance,

(Testimony of Robert W. Irwin.)

we will accept the settlement tendered." (Petitioner's Ex. 49; Dep., p. 42.)

On August 24, 1928, Dealer wrote a letter to us enclosing what purports to be a statement of the merchandise of our make that they had on hand July 28. I do not know just the object of sending that list unless it was to reconcile our books with theirs. It purports to include the goods that came under the agreement of April 1st and were shipped under that agreement and those which we took back title to. (Dep., p. 43; Petitioner's Ex. 50.)

On September 5 I wrote to the Dealer: "We are duly in receipt of the corrected bill of sale of Royal goods and enclose herewith a copy of the consigned agreement." (Petitioner's Ex. 51; Dep., p. 44.) [7]

The bill of sale referred to in my letter was that list of August 6. (Dep., p. 44.)

The letter of September 5, 1928, also stated: "There were three items on the list of foods reported sold which were your property as they were not included in the re-transfer of title to us. We refer to two No. 1287 tables, one No. 1337 and one No. 1355."

The Dealer's report included certain items of furniture which were not covered by the April 1st agreement, so in the enclosure in our letter of September 5 I made that correction and enclosed a list which covered the furniture pursuant to the April 1, 1928, agreement. (Dep., p. 47; Petitioner's Ex. 51.)

(Testimony of Robert W. Irwin.)

Note: Petitioner's Ex. 56, comprising the invoice of goods shipped subsequent to April 1, 1928, shows that the above-mentioned items No. 1287 and No. 1337 were invoiced under date of April 13, 1928, and No. 1355 under date of April 24, 1928. These three items are the only items shipped subsequent to April 1 on which the Dealer ever made any report or accounting to the Irwin Company.)

On September 5, 1928, I sent the Dealer its copy of the April 1st agreement. I had held these copies on my desk with the other papers pending the getting of a correct list of the goods that we took back title to, and which is referred to in paragraph nine of the agreement. (Dep., p. 45.) Between April 1 and August 6, 1928, we had not yet agreed on the items on the list as a whole, which was later incorporated in the bill of sale. (Dep., p. 61.) But prior to that date, and between April 1st and this date, we operated under the April 1st agreement. (Dep., p. 45.)

The final outcome of our correspondence with respect to the amount of furniture which should be included in the bill of sale as follows: The Dealer owed my company about $116,000, of which $14,490 was owing for Royal furniture. The Dealer, by the list or bill of sale, re-transferred to us furniture amounting to said sum of $14,400 and gave us two notes representing the balance of the account. One of these notes was paid, the other was not, when due. The amount the Dealer paid

(Testimony of Robert W. Irwin.)

by notes was in full payment of the Phoenix account. (Dep. pp. 22 and 23.) [8]

Unless the Dealer had either executed the April 1st agreement and the bill of sale or paid what was due on the old account, we would not have shipped any goods on the so-called Ferris order or any other furniture. (Dep. pp. 44, 56.)

Beginning with September, 1927, up to the time we released the Ferris order we made the following shipments of goods to the Dealer: September, 1927, $130.00; October, $140.00; November, $120.00; December, none; January, 1928, none; February, none; March, none; April, $12,523.50; and May, $2,214.00. (Dep. p. 8.)

Petitioner's Exhibits 55 and 56 show the invoices of Phoenix goods and invoices of Royal goods, respectively, shipped by us to the Dealer after the execution of the agreement of April 1st, 1928.

> (Note on Exhibits 55 and 56: The only shipment of Phoenix goods after April, 1928, was an invoice of $14.00 dated July 30, 1928. The only shipments of Royal goods after May, 1928, were the following: August 8, 1928, $118.00; August 20, 1928, $185.00.)

The last shipment of merchandise was made August 20, 1928. (Dep. p. 73.)

My only knowledge of the Dealer's financial condition was as stated to me by Mr. Wadenstein when he was in Grand Rapids in November, 1927, and also a report received by me dated January 1, 1928. I relied on those representations as to the financial

(Testimony of Robert W. Irwin.)

condition of that company. If I had had knowledge that they were in a bad way financially I would not have entertained the execution of the agreement which was made on April 1, 1928. (Dep. p. 55.) On April 1, 1928, the Dealer owed us something between $16,000 and $17,000. (Dep. pp. 55, 56.)

Prior to my receipt of the list of furniture set forth in Petitioner's Exhibit 28 (bill of sale dated August 6, 1928) I had no knowledge as to the failure or insolvent financial condition of the Dealer company. Directly to the contrary, I had a financial [9] statement from them as of January 1 which showed that they had assets of $230,580.52 with liabilities of $129,839.42, leaving an equity in capital and surplus of $100,741.10. (Dep. p. 24. This was the information contained in their statement enclosed with their letter of March 6, 1928. (Ex. 18, 18a.) It was the only knowledge I had of their financial condition. (Dep. p. 25.)

It was not an unusual thing for us to receive a request from the Dealer that payment of their account be deferred. It was a common request and we were extending their payments from time to time. We were accepting new notes in lieu of old ones because we had confidence in the ultimate outcome of their business. At the time of these transactions I knew the Dealer was behind with the payment of its bills and I assumed that they did not have the money with which to meet these things because they had not paid us. (Dep. pp. 58, 90, 91.) I was not concerned about the financial condition

(Testimony of Robert W. Irwin.)

of the Dealer company until I had notice of their putting Mr. Hills in as assignee. At the time we entered into the proposed agreement of April 1, 1928, I knew that they did not have a sufficient amount of money to operate upon the scale upon which they were operating and pay their bills promptly but I had no thought that they were in danger of failure. (Dep. p. 68.)

I knew at that time they were not only not paying their bills promptly but they were very much in arrears in the payment of their accounts. (Dep. pp. 68, 69.)

The consideration for the agreement of April 1, 1928, was that we would continue to ship them more goods. We were unwilling to ship any more goods on open account and we did not. (Dep. p. 24.)

There was no intent on the part of the Irwin Company by the execution of this agreement and the accepting of this list or the so-called bill of sale to prefer itself over other creditors of Renfro-Wadenstein. (Dep. pp. 25, 44, 56.) [10]

The obtaining this bill of sale from the Dealer transferring to us merchandise which had previously been sold on open account was the basis of an arrangement for future payments to secure the extension of credit to the Dealer. We did it to relieve them from that much indebtedness. We agreed to take back title to that amount to reduce their indebtedness to that extent so that we might have a basis for extending further credit. We had no thought of more security. We were laying the

(Testimony of Robert W. Irwin.)

basis for credit for future business. We were trying to develop a basis whereby there would not be a limitation in credit so we would be justified in shipping them goods from time to time. If we held title to the goods and if they paid for them as fast as sold we felt we would be justified in backing them with merchandise to the maximum extent in their new enterprise. We would be in a better position if we held title to the goods. The thought we had in mind was that we would be more secured that way than otherwise because their financial condition did not warrant us in extending to them as large a credit as they would need to handle our goods upon the scale that they were willing to handle them and we were looking for an outlet for our goods in that territory. We were willing to let them have as much merchandise as they thought they needed, as they would be willing to pay for, and as one of the methods of securing safety of our account. (Dep. pp. 63, 64.)

Subsequent to the execution of the April 1, 1928, agreement the Dealer never lived up to its agreement in the matter of its accounting. We had only one report of sales. (Dep. pp. 25, 27, 28.) The only sales report that they sent us was the one in which they sent a note settlement. We accepted that note settlement but wrote them that it was not in accordance with the terms of the contract and that hereafter we wanted them to comply with the terms of the contract, making their reports and settlements as [11] provided for in the contract.

(Testimony of Robert W. Irwin.)

(Dep. pp. 25, 26, 44 to 46 and Petitioner's Ex. 51.)

We did not receive from the Dealer any cash remittance nor any notes collateralled by this assignment of accounts as provided in the agreement of April 1, 1928. (Dep. pp. 26, 53.) We wrote them and asked them to comply with the agreement. (Dep. p. 26.) Under the contract the Dealer was to make a cash remittance and if they were unable to make a cash remittance they were to give us a demand note collateralled by accounts receivable.

There were no payments made by the Dealer for any furniture shipped subsequent to the execution of the April 1st agreement except as contained in the notes of August 24, and those notes were not paid (Dep. pp. 52, 73), and we still have them. We accepted these notes because they didn't seem to be able to do any better at that time and we had confidence in the men and the business and were willing to give them a little extra time until they could get started. (Dep. p. 53.)

My company did not at any time authorize the Dealer to assign or pledge any accounts representing any goods covered under the agreement of April 1st which were shipped after the agreement was executed, neither did we authorize the Dealer to sell any of the accounts receivable representing the goods sold by the Dealer which had been obtained from us under the April 1st agreement. (Dep. pp. 53, 56.) We had no knowledge that the Dealer was pledging these accounts receivable representing furniture sold by them which had been

(Testimony of Robert W. Irwin.)

shipped to them by us subsequent to the execution of the agreement. Prior to April 1, 1928, I had knowledge that the Dealer had a practice of pledging its accounts receivable. I obtained that information from M. Wadenstein when he was in Grand Rapids in November, 1927. Analyzing his statement, I noticed something in the statement that made me ask him the question and I developed the information from him that they were pledging their [12] accounts receivable. Later, in January or February, I had a communication from him stating that he had an arrangement with his landlord through which he could pledge his accounts receivable. To provide against that practice a paragraph was inserted in the agreement of April 1st because of the knowledge I had of the practice he had been pursuing. (Dep. p. 54.)

We coined the term "special account" for designating on our books the account of the goods that we shipped to the Dealer on consignment under the terms of the April 1st agreement. (Dep. p. 42.) The goods that were shipped after that contract was executed were shipped to Renfro-Wadenstein, Special Account, and at a later date when the list was finally completed and accepted by us we transferred the items to the amount of that list from the regular Renfro-Wadenstein account to this new special account. (Dep. pp. 43, 52, 85, 86.) We did not at any time instruct the Dealer as to the price at which they should sell the merchandise. (Dep. p. 95.) Outside of the contract

(Testimony of Robert W. Irwin.)

of April 1st itself, we never entered into any arrangement with the Dealer whereby this merchandise was to be kept separate and apart from any other merchandise, nor as to the manner in which it should be displayed or exhibited. I think it would have to be intermingled with other merchandise sent to them from other concerns in order to make the best display for sale. The was nothing on our merchandise, to my knowledge, that would indicate that it had been sent to the Dealer in any manner other than by a straight sale. The merchandise was shipped direct to the Dealer, bill of lading mailed to the Dealer, and I assume that they presented the bill of lading to the proper carrier, and picked up the merchandise. (Dep. p. 66.)

After the Dealer sold the merchandise we made no effort to find out what they did with the money.

We had a contract with them and they were to make settlements [13] with us in accordance with the terms of the contract. (Dep. p. 75.) I don't know whether this money was or could have been deposited with their other moneys in the bank. They were several thousand miles away. I assumed they were men of integrity and would carry out the terms of the agreement that they had signed. Outside of the agreement of April 1st we had no arrangement that they were to segregate their funds received from the sale of this merchandise. (Dep. pp. 75, 76.) The Irwin Company at no time subsequent to April 1, 1928, ever consented that the Dealer should treat the furniture shipped

(Testimony of Robert W. Irwin.)

by my company to them under the April 1st agreement as if it had been shipped on open account or credit (Dep. 27), nor did it ever exercise its option under the contract to require the Dealer to keep and pay for consigned goods remaining on hand. (Dep. pp. 91, 92.)

SUMMARY OF ROTHSCHILD TESTIMONY.

TESTIMONY OF EMIL ROTHSCHILD, FOR PETITIONERS.

My name is Emil Rothschild and known as E. J. Rothschild. I am president of Ketcham & Rothschild, engaged in the furniture business in Chicago. My company commenced doing business with the bankrupt in about 1922. I made a trip to Seattle in March, 1928. (Tr. 17.) Prior to coming out here in March I had two conversations with Mr. Robert W. Irwin of the Robert W. Irwin Company. One of these was in New York City and the other was at Grand Rapids within the week prior to my coming here. I went to Grand Rapids particularly to go into conference with Mr. Irwin on the subject of this account. My purpose in coming here to Seattle was to work out some scheme whereby we might extend to the Dealer company credit to the extent of its needs. (Tr. 18.) We had both been extending a very liberal line of credit to the Dealer. (Tr. 119, 120.)

At the time of my conference with Mr. Irwin the Dealer owed us approximately $16,000 or $17,000 and a similar sum to Mr. Irwin. (Tr. 121.)

(Testimony of Emil Rothschild.)

At that time all their account with us was covered by notes. (Tr. 19, 31, 121, 122.)

Mr. Irwin and I were in agreement that our interests [14] were very much alike and our positions very much the same, and he rather decided I should try to work out some scheme that would be agreeable to Renfro-Wadenstein and that I thought was best for our two concerns and whatever form of arrangement I might make for ourselves he thought would be agreeable to him. (Tr. 19.)

Mr. Irwin made the draft of the contract which we contemplated. (Tr. 142.) He and I discussed several ways that would make the account of Renfro-Wadenstein a satisfactory one and the method of extending credit to them, and we discussed various ways of accomplishing that. We discussed some as to whether we would ask them to reduce the amount of the business. Each of us had an order on file unfilled waiting our decision as to the further credit, and Mr. Irwin suggested that he had quite satisfactorily taken care of an account in New York by applying a contract which he produced a copy of, and he said it might be a good plan to put these goods on consignment, to which I replied Ketcham & Rothschild did not do any consignment. He suggested at times it might be a safer way where you are extending a longer credit and read over the form he had used in some account he had in the east, and from that he said, "why not take along with you a copy of the draft?" He drafted

(Testimony of Emil Rothschild.)

a copy that I took with me from parts of the contract he had used in New York. (Tr. 143, 144, 183, 184.) I got here approximately March 20 and was here four nights. (Tr. 19.)

A written agreement between the Dealer and our company was signed by Mr. Wadenstein who gave it to me on March 23, 1928, together with the attached letter dated March 23, 1928. (Petitioner's Ex. 1; Tr. 20, 30.) The contract and the letter were signed at the same time. I had given them a draft of the agreement that would be agreeable to us and attached to it a memorandum of omissions they had apparently made in drawing the contract. (Tr. 23.) Paragraph 9 of the consignment agreement recites that the Dealer has in its possession certain goods as per attached list (Tr. 24), but there was not any list attached to the consignment [15] agreement at any time. (Tr. 25.) I did not sign the contract here for my firm but took it back east with me. (Tr. 35.) When the Dealer handed the contract to me it had already been signed by them in my presence and the date was left blank. They actually signed it on March 23. My firm signed it in Chicago on March 30 and the date March 30 was inserted by J. W. Rothschild. (Tr. 26.) At the time the consignment agreement was signed by the Dealer we did not know exactly what furniture was on their floor; we knew there was an approximate quantity in dollars and cents. No list of our furniture on their floor specifying as to items was given to me while I was here in March

(Testimony of Emil Rothschild.)

but the approximate figure was taken from their stock cards and rendered. (Tr. 30, 88.) Subsequently they gave us a bill of sale back for the furniture of ours which was on their floor. This furniture had been sold to them on open account and was their furniture prior to the execution of the bill of sale. (Tr. 31.) We received notes from the Dealer to take care of the difference between the amount of furniture sold back to us and the amount of the indebtedness. We received this approximately the end of April or perhaps in May. (Tr. 31.) We received an inventory in the form of a bill of sale dated April 16, 1928. (Tr. 31; Petitioner's Ex. 2.) This bill of sale was subsequently corrected on April —— and filed for record in the office of the Auditor of King County, Washington, on April 24, 1928. (Tr. ——.)

After the receipt by us of the bill of sale the indebtedness of the Dealer to us for the goods covered by the bill of sale was cancelled. (Tr. 37.)

The Dealer wrote us a letter April 28 enclosing a remittance sheet and inventory dated April 27. (Tr. 41; Petitioner's Ex. 4.) In the letter the Dealer stated that they had taken the difference between the amount of merchandise they were returning [16] to us and the amount of indebtedness they owed us prior thereto and "divided it into thirty, sixty and ninety day notes, which will take just a little more time than our agreement . . . . " (Tr. 42, 43; Petitioner's Ex. 4.) Enclosed in that letter was what is termed a remittance sheet dated

(Testimony of Emil Rothschild.)

April 27 and also an inventory dated April 27. The inventory included all merchandise they had on hand of our make including that covered in the bill of sale, whether it belonged to them or to us, and also included the merchandise which we had subsequently shipped to them on special account. (Tr. 45, 46.)

The remittance sheet refers to notes for an indebtedness previously incurred. (Tr. 46, 47.) The reference in the remittance sheet to the two invoices of April 2 and April 7 was for merchandise we shipped them on consignment account after the consignment agreement. (Tr. 47.) We had completed our transactions with them by receiving the bill of sale dated April 16 but we accepted their figures on April 27 as being correct and made our book entries in harmony with it. (Tr. 53.)

We made a special invoice back to the Dealer in the total sum of $11,695 for the goods contained in the bill of sale. (Tr. 68.) This was one way we gave evidence of the consignment. (Tr. 69.) Under the consignment contract we consigned to the Dealer on April 2, 1928, goods amounting to $4,569; on April 7, $1,257; on May 10, $282; on May 14, $656.-56; on May 18, $106.33. We made no other consignments to the Dealer. (Tr. 70, 71; Petitioner's Ex. 9.)

At the time of my conference with Mr. Irwin in Grand Rapids I had with me the detailed statement as of December 31 and he had one that pre-dated that. We compared the figures on them and com-

(Testimony of Emil Rothschild.)

mented on the fact that the disparity of figures was no doubt occasioned by the amount of bills receivable they borrowed on, [17] and he thought it would be well for me to come out and see what opportunity they had and determine whether or not I thought it was a desirable account to continue. (Tr. 146.)

I had not come in close contact personally with Mr. Renfro and Mr. Wadenstein except occasionally and I was anxious to get a close-up of what they were like, their mannerisms and method of doing business and make some local inquiries about them. From the local inquiries which I made I considered that with the assistance of factories like Mr. Irwin's and our own, and the equity they had in the business they had a good chance of becoming a very good firm. (Tr. 147.) We thought the Dealer had insufficient working capital. (Tr. 186.)

In that conversation Mr. Irwin told me that as far as he was concerned he would not ship any more merchandise on open account unless I found their condition was better than he deducted from the statements he had before him and unless I discovered some way which would make him feel secure. (Tr. 187.) After I looked over the ground and made inquiries I decided in our interest and in Mr. Irwin's interest to bring up the question of consignment with the Dealer. (Tr. 191.) We had always granted them permission to settle their account by note when due, net, and they continued to do that. (Tr. 194.)

(Testimony of Emil Rothschild.)

From their statement I had no doubt that they were solvent and that we could terminate our contract if we deemed that the best arrangement. I did not think of the arrangement in the sense of its being safer for us to take the furniture back and then consign it to them. I thought it was the simplest way to handle the bookkeeping. In the new way it would be a better mode of knowing when payment was due. (Tr. 150.)

This was a departure from our general practice of selling merchandise. We were not accustomed to selling on consignment. [18] We naturally preferred the routine open account. (Tr. 151.) We sell to 300 retail furniture stores throughout the United States. Of those two are on consignment,—one at the time we entered into this contract. (Tr. 153.)

We took back the bill of sale from the Dealer according to our contract and proposed to leave it with them to sell for us. We did not have any intention or idea at that time of making any disposition of the furniture other than through Dealer. (Tr. 168.) Conditions could arise when we might. (Tr. 169.) Some of the furniture had been on the Dealer's floor a considerable period of time and there had been some style changes and obsolesence. (Tr. 169.)

We shipped the Dealer no furniture in December 1927, January, February or March, 1928. (Tr. 138, 176.) The shipment we made on April 2 was on orders that we got from them the end of February,

(Testimony of Emil Rothschild.)

1928, or the early part of March. (Tr. 176.) Our total shipments, subsequent to the consignment agreement, aggregated about $6,000. (Tr. 179.) In our dealings with the Dealer after the execution and return to us of this consignment contract we did not give the Dealer an option to return the furniture at any time they elected. There was no change in the contract in that regard. (Tr. 181, 182.) The contract provided that they were not to sell for less than the invoice price, but any price above that was at their election at all times. The Dealer at all times was required to pay the freight. (Tr. 182.)

Every time they had a note due they would renew the note or send notes for new invoices. I objected to that up to the time I found they thought they were working on this frozen credit. (Tr. 121.) Our conditions were not the same as Mr. Irwin's firm. They had succeeded in getting some cash remittances in amounts of $2,000. each. The exact number I don't recall. (Tr. 121.) The Dealer owed us $16,000 evidenced by notes. Sometimes in advance [19] of maturity of these notes and sometimes after maturity they would send us renewals. For a long time I was in doubt whether they were working under our frozen credit special arrangements or whether they were still buying at 2%—30 days, net 60 days, and I have a distinct recollection of writing them some time in 1927, perhaps more than once. (Tr. 122.)

When they continued constantly sending us re-

(Testimony of Emil Rothschild.)

newal notes I wrote them it was very inconvenient to receive renewal notes at times past the date they were due and in consequence the notes themselves went to protest. (Tr. 123.)

Very late in 1927 or early in 1928 we received a letter from the Dealer in which they stated that according to the special terms we had made them they had more merchandise on the floor than what they owed us in the form of bills receivable. It is very likely we had billed them out in regular terms until we found definitely they were working under what we saw fit to call a "special arrangement". (Tr. 123.) After we sent the letter outlining the terms of the frozen credit we continued to bill them on the usual terms of 2%—30 days.

We were much amazed that they sent us notes at the maturity of the invoice. (Tr. 124, 125.) We kept the notes and gave them to our Chicago bank, and we presume they sent them out. In a number of instances those notes were protested. (Tr. 125, 126.)

It is hard to make a flat statement whether in a great majority of instances the Dealer in 1927 and early part of 1928 was meeting its obligations simply by asking us to accept renewal notes. When Mr. Wadenstein wrote us making it evident he was working under our frozen credit we wrote them to send us renewal notes in time to take up the ones we had. (Tr. 126.) The frozen credit was up to $15,000. (Tr. 134.) In February and March, 1928, they had less merchandise on the floor than they

(Testimony of Emil Rothschild.)

owed us money. (Tr. [20] 136.) About the middle of February, 1928, they owed us on open account $4,388.50 and on bills receivable $12,873.53, or a total of some $17,000. (Tr. 137.)

According to their statement to us they had $14,-331.28 merchandise of our make on hand as of date December 31, 1927. (Tr. 138.) At some time before I came out to Seattle in March, 1928, I knew that the Dealer was assigning its accounts to discount companies. (Tr. 139, 140.) Mr. Irwin and I discussed that feature of the situation. We were not necessarily dissatisfied with it. We didn't approve or disapprove. It was none of our concern provided they were good. (Tr. 140.)

From my conversation with Mr. Irwin I learned that they had not paid their accounts to him as promptly as he felt they ought to pay. (Tr. 140, 141.) I wouldn't want to say that they never did pay on the due date; I wouldn't want to say whether or not he told me of any instance where they did pay on the due date. We did not go into it. He told me that the account had been settled for usually by notes and it had taken on a pretty good sized proportion and that he had asked them to reduce it some and that they had agreed to go ahead and make some payments to him at so much per month. He said they had some payments but had stopped making them again. (Tr. 141.)

During 1927 we extended to the Dealer what might be called a frozen credit. (Tr. 113, 114.) In 1927 some of our invoices to the Dealer had words "terms special" written thereon. (Tr. 116.)

(Testimony of Emil Rothschild.)

These special terms at that time referred to our arrangements for a so-called frozen credit, the terms for which are set forth in Trustee's Exhibit "A," the letter of the Dealer dated March 11, 1927 to us, and our letter in reply thereto dated March 22, 1927. In the last-mentioned letter we stated the terms as follows: " . . . . We suggest as a credit arrangement that we grant [21] you a standing credit of whatever sum you may have invested in samples of our goods, up to $15,000, you to pay interest at the rate of 7% for the use of this credit; the amount of interest due to be determined and payable at each inventory time. We would want to reserve the right of closing this special credit at any time by giving you notice in writing, in which case the credit granted for sample purposes would become due for payment net, one year from the time of such notice, interest ceasing from the time of our giving notice. In addition to the credit above suggested we would make the terms for your further purchases subject to terms 2%—30 days, net 60 days, with a 30 day dating." (Tr. 116, 117.)

For a long time I was in doubt whether the Dealer was working under our frozen credit special arrangement or whether they were still buying at 2% —30 days, net 60 days (Tr. 122), and the reason we were not sure was because they kept remitting for these accounts with notes. We did not interpret that as the proper method of following this frozen credit. When they continued to do so and constantly sent us renewed notes I wrote them it

(Testimony of Emil Rothschild.)

was very inconvenient to receive renewal notes at times past the date that they were due and in consequence the notes themselves went to protest. (Tr. 122, 123.) My idea of the frozen credit was that we would extend them a credit for merchandise which would remain as indebtedness from them to us up to $15,000 that they would use toward having samples to that value on their floor. Any merchandise they bought in excess of that sum or that was not to be on their floor *the* would pay in their usual terms 2%—30 days, net 60 days, 30 extra. (Tr. 125, 170, 171, 173.)

I was never quite sure until some time later that they had accepted our proposed arrangement for a frozen credit. I believe it was some time in October, 1927, that I was sure they were [22] working under that arrangement. The frozen credit arrangement was terminated when I was here in Seattle, by mutual agreement that we would do away with the frozen credit and work under a different plan, namely, the consignment contract. (Tr. 193.)

During 1928 after the consignment agreement we carried with the Dealer what we termed a direct charge account and also a special account. (Ex. 20, letter dated June 2, 1928, Ketcham & Rothschild to Renfro-Wadenstein.)

The purpose of the special account was to show on our books the status of the merchandise we had on consignment with Renfro-Wadenstein. (Tr. 81.) The special account was set forth in the several appropriate books of account and its purpose was to

(Testimony of Emil Rothschild.)

show on our books the status of the merchandise we had on consignment with Renfro-Wadenstein. In order to record all our consignment sales in one place we kept, in the regular course of business our "Consignment Sales Account No. 201" (Ketcham & Rothschild Ex. 9), which contained entries of the Renfro-Wadenstein account together with those of other dealers. After the consignment agreement under our practice of bookkeeping the Dealer was never billed direct for the merchandise sent on consignment until the goods were reported sold. (Tr. 52.)

Our first shipment of goods on consignment to the Dealer was on April 2, 1928; prior to that everything had been sold on open account. (Tr. 110.) We adopted this designation on our invoices "Terms special" to indicate a consignment arrangement in accordance with the consignment contract. (Tr. 110.)

In 1927 the printed form of our invoices contained the words "terms 2%—30 days, or net 60 days." (Tr. 111.)

It was well understood that we would keep our affairs as closed as we could to our office force and to the business public and so as to not have the exact terms under which we were shipping [23] merchandise disclosed to everybody around our place we adopted the expression "special" to denote goods shipped on the special arrangement we had made with the Dealer. (Tr. 112.) In our invoices of October 20, 1927, we invoiced merchandise to Renfro-Wadenstein "terms special"; that was to

(Testimony of Emil Rothschild.)

indicate the frozen credit arrangement which we had with the Dealer at that time. (Tr. 113.) Another reason for billing the consigned goods "terms special" was that we did not want the invoices laying around before employees of Renfro-Wadenstein who might shift from place to place, or any other firm. I would not stress as my reason our disinclination for our own office force to know the exact terms; we were not as near fearful of our own office force as we were of that part that might be transient and go to different firms. (Tr. 178, 179.) The term consignment appears in our ledger, to what extent I cannot say. (Tr. 178.) It was open to the knowledge of certain portions of our office force that some goods were shipped on consignment. (Tr. 179.)

I never at any time consented to the Dealer pledging or assigning any accounts receivable representing merchandise of ours which had been sold. At no time prior to the time that I was notified that Mr. Hills had taken possession of the concern was I cognizant of the fact that they were assigning or pledging accounts receivable of ours, representing furniture sold which had been left with them under the consignment agreement. I do not know in definite figures how much merchandise was sold by the Dealer and not accounted for to us. (Tr. 106.) Prior to the time I entered into the consignment agreement I had been advised that the Dealer was assigning or pledging its accounts receivable for furniture sold on open account. I did not at

(Testimony of Emil Rothschild.)

any time have any knowledge that the accounts receivable representing the consigned merchandise were to be or had been pledged or hypothecated or assigned. (Tr. 202.) [24]

August 24, 1928, Renfro-Wadenstein wrote us a letter in which they said: "We are not able to enclose a check with this report but will try to do so during the coming week. We do not like to drag along this way on our remittances but collections and business during the summer months, as you undoubtedly know, are difficult, and we will just have to do the best we can." The last paragraph of their letter is as follows: "Possibly you do not realize that under our method of carrying accounts, we have to carry a substantial reserve on these and altogether we have quite a little money tied up in accounts receivable."

In reply to that letter we wrote Renfro-Wadenstein on August 28 a letter in which we stated: "We must express extreme disappointment that you did not enclose check with statements. We notice particularly the last paragraph of your letter, and would have you understand that we are thoroughly acquainted with how you are carrying your accounts, which makes it all the more difficult for us to understand why we should not receive our money promptly when due. In the manner you are treating payments to us, you not alone have the use of our merchandise, but presume to use in addition to it, cash returns that you must receive for goods sold. This is so apparently unfair, that you will

(Testimony of Emil Rothschild.)

readily understand our protest against your doing so. If we are to work in harmony it will be absolutely necessary for you to make your settlements in accordance with the agreement which we mutually decided would be agreeable. We would thank you to send us remittance for such amounts as are now due for payment." (Petitioner Ketcham & Rothschild's Ex. —— and ——, Tr. pp. 203, 204.)

While I was aware of the fact that Renfro-Wadenstein were in the habit of borrowing on their bills receivable I could not see what bearing that had on any merchandise we had out there that belonged to us, that they could not borrow on any more than [25] I could on this Smith Building. (Tr. 204.) My letter means that they were borrowing on their accounts receivable but ours was not one of their accounts receivable.

The Dealer would have to wait thirty, sixty or ninety days, or longer, to get money for its goods sold if it was not paid in cash. Some of Renfro-Wadenstein's business was on open account and some on contract, but I do not know the proportions. (Tr. 206.) We did not have any prohibition on the Dealer that it could not sell any of this furniture on conditional sales contract, but I believe it is a condition in the contract that we held title to the property until we were paid for it. (Tr. 208.) The Dealer could sell on conditional sales contract. This is my first experience in sales on consignment. (Tr. 208.)

I don't know whether the consigned goods were kept separate and apart from the rest of the Deal-

(Testimony of Emil Rothschild.)

er's goods while they were on the Dealer's floor. (Tr. 107, 108.) We are in the habit of putting a small paster containing our name and pattern number on the bottom side of the seats. We have been more recently in the habit of putting on a metal tag reading "Ketcham & Rothschild—Chicago." We use numbers to designate the pieces. (Tr. 108.) This tag or label is one that we are in the practice of putting on all our furniture and we did not adopt that practice for these particular shipments. There is nothing in the tag which we put on the furniture to indicate that it was delivered to the Dealer under any unusual conditions other than a direct sale. (Tr. 109.)

During 1927 and 1928 we shipped all the furniture by bills of lading direct to the Dealer. After the consignment arrangement we made no distinction in the mode of shipment so far as bills of lading were concerned. (Tr. 118.)

We never at any time sought to hold the Dealer for the invoice price of the goods left on consignment with it but not [26] sold by it. We did not at any time receive any notes collateralled by any assignments from the Dealer. They paid us for all goods which they reported sold. (Tr. 107.) These payments were made in cash excepting one which was made by note. (Tr. 78.) So far as direct charges against the Dealer are concerned, the account would be closed on receipt of the note and the action or treatment of that note later on would be a second transaction. They were all satisfied.

(Testimony of Emil Rothschild.)

(Tr. 79.) As fast as goods were reported sold to us in accordance with their contract we made a direct charge for the amount of the reported sales, crediting the consignment account and their special account. (Tr. 75, 80, 82.)

We would receive from the Dealer a monthly statement of the furniture sold and then would immediately bill them a direct charge giving them a discount of 2% payable the 20th of the following month. (Tr. 130.) The dealer sent us a statement of goods sold dated June 10 (Ketcham & Rothschild's Ex. 22, Tr. 100.) and a statement of goods sold dated July 28 (Ketcham & Rothschild's Ex. 37, Tr. 104).

Under our practice of bookkeeping the Dealer was not billed direct for merchandise sent to it on consignment until the goods were reported sold by the Dealer. (Tr. 52.)

We did not at any time seek to hold the Dealer for the invoice price of the goods left on consignment with them but not sold by them. At my instance there was served on the bankrupt and on the Trustee the notice terminating the consignment contract and demanding the return of the goods. (Tr. 107.) [27]

TESTIMONY OF O. A. WADENSTEIN, FOR PETITIONERS.

I was president of Renfro-Wadenstein, a corporation organized approximately eleven years ago. Originally it was called Hanson-Wadenstein

(Testimony of O. A. Wadenstein.)

Desk Company, then changed to Renfro-Wadenstein Desk Company, and later changed to Renfro-Wadenstein. At the time the petition in bankruptcy was filed its place of business was at 5th and Pike in Seattle, and it was engaged in the retail furniture business handling what would be known as the better grade of furniture. We moved into our store at 5th and Pike approximately April 4, 1928. (Tr. 214, 215.) Prior to that we had been located at 5th and Virginia. For approximately five years prior to the petition in bankruptcy we had had business relations with the petitioner Ketcham & Rothschild and also with the petitioner Robert W. Irwin. Ketcham & Rothschild was located at Chicago, Ill., and manufactured upholstered furniture of a high grade. Robert W. Irwin Company was engaged in the manufacture of high grade bedroom furniture and dining-room furniture. (Tr. 215, 216.) Prior to the latter part of March, 1928, we had brought considerable furniture from both of those concerns. (Tr. 216.)

Prior to the last of March, 1928, our general terms of purchase from those two concerns were that we were to have permission to settle at the end of sixty days. Our usual terms upon invoice were 2% thirty, net sixty. In making our purchases we had requested and it had been granted that we were to have the privilege of settling for those invoices with ninety day notes at the expiration of sixty days, which would give us five months. This arrangement was sometimes oral and very often referred

(Testimony of O. A. Wadenstein.)

to in writing. (Tr. 217.) About once a year Mr. Renfro and I would visit the factories and explain the necessity of having plenty of credit. [28]

Our credit was not even limited to ninety days. The factory understood we would frequently ask them to accept a note. What we were asking them to do was to help us carry the amount of furniture it was necessary to display on our floors. (Tr. 219.)

After we would return from these periodical trips to the creditors' place of business there would be no change on the terms on the invoice and the question of additional time by notes would be referred to and embodied in subsequent letters exchanged between us. (Tr. 220.) We explained that we were operating a larger business than our capital would justify; that we would like to carry these lines of merchandise and that in order to have these lines of merchandise it would be necesssary for us to have more than the usual terms of credit. (Tr. 227.)

These conversations would generally be had with Mr. Irwin at Grand Rapids in the case of the Irwin Company and with Mr. E. J. Rothschild at Chicago in the case of Ketcham & Rothschild. (Tr. 228.) Just prior to the time of the execution of the consignment agreement our concern owed these concerns just roughly $15,000 each. (Tr. 228.) Just prior to the execution of the consignment agreement our credit arrangment with Ketcham & Rothschild was the one under which we had an understanding that they would extend credit up to approximately $15,-

(Testimony of O. A. Wadenstein.)

000. As to any frozen credit arrangment with Robert W. Irwin Company I don't think there was any amount definitely agreed upon. When we visited Mr. Irwin and would go over our accounts with him we generally referred to about the amount they were then carrying us for which happened to be about the same amount. (Tr. 229.) When I visited Mr. Irwin in November, 1927, we agreed to pay at least part of our account by making payments of $2,000 a month. (Tr. 229, 230.)

Mr. E. J. Rothschild visited our store in March, 1928. That was the time the consignment arrangement was entered into. (Tr. 230.) [29]

He was here two or three days just a short time before the agreement was signed. As nearly as I can remember we signed the Ketcham & Rothschild and the Irwin agreements before he left. (Tr. 233.) I am quite sure Mr. Rothschild took them away with him. (Tr. 234.) At the time the consignment contract was entered into Mr. Rothschild did not have an exact list of the furniture to be conveyed back in accordance with paragraph 9 of the consignment agreement. (Tr. 235, 237, 238.) We went over our stock record to arrive at the approximate amount. (Tr. 238.) It would have been necessary for us to take an inventory to furnish him at that time with an exact itemized list of the Ketcham & Rothschild furniture on our floor and we did not have time to do that while he was here. (Tr. 238.) At the time Mr. Rothschild was here it was not known either to Mr. Rothschild or to us what were the spe-

(Testimony of O. A. Wadenstein.)

cific goods which would be conveyed back to the Irwin Company in accordance with the agreement. (Tr. 238, 239.) This was for the reason that we did not have a list. (Tr. 239.)

I wrote the letter of March 23, 1928, which is attached to the consignment agreement as Petitioner Rothschild's Exhibit 1; I wrote this on the date it bears. (Tr. 239.) I have not any way of telling whether this letter of March 23 was signed by me at the same time the consignment agreement was signed; I am not clear as to whether this contract was signed when Mr. Rothschild was here or not. (Tr. 241.) When Mr. Rothschild was here these consignment arrangments were drawn up and these bills of sale were drawn up for both companies. In the case of Ketcham & Rothschild they were drawn up and signed when he was here but in the case of Irwin he merely went back and made his report to them and this matter I think continued for several months before the Irwin Company sent the bill to be executed. (Tr. 429, 439, 440.) The consignment agreements were both signed while Mr. Rothschild was [30] here and the bills of sale were subsequently prepared by us. (Tr. 429, 430.)

I had tried to get Mr. Rothschild to fill the pending orders under the same arrangements which they had made previous shipments and they did not want to do that unless we cleaned up the old account. (Tr. 430.) I know that Irwin and Ketcham & Rothschild were not just exactly easy about the account. It ran into quite a little money and we had not been able to pay it as well as we expected and we were

(Testimony of O. A. Wadenstein.)

perhaps a little too optimistic in the way we handled the account, and in the discussion we finally evolved this plan. I presume it may have been an ultimatum that they said "No, we will not ship any more unless we can protect ourselves in some way," but I don't remember that. (Tr. 431.)

The reason for the delay in finally executing the Robert W. Irwin bill of sale was that when the first bill of sale was mailed to them we had a letter from Mr. Irwin stating that it contained more merchandise than he agreed to have turned back to them. There was some correspondence back and forth in regard to that and we finally arrived at the amount by taking all of the merchandise that was shipped by the Royal division of the Robert W. Irwin Company. We agreed to keep the Phoenix furniture and to pay for this. It was shortly after we had moved. Our letters were delayed somewhat and I think their letters were delayed somewhat, and that time just naturally elapsed before the matter was completely covered. (Tr. 274, 275.)

Practically all the concerns with whom we did a considerable volume of business gave us extended credit, permitted us to settle on about the same basis as we settled in the case of these two concerns. By extended credit I mean the right to pay at the expiration of the invoice with a ninety day note subject to part renewal as a rule. During the four or five years that our concern [31] wes in business it was its practice to pay its bills with furniture manufacturers by notes and renew those notes

(Testimony of O. A. Wadenstein.)

on occasion. That was a practice which had been employed with the Robert W. Irwin Company for a number of years prior to the consignment arrangement. (Tr. 255, 256.) Prior to the execution of the consignment agreement no suits or actions had been started against Renfro-Wadenstein Company. (Tr. 257.)

Up to and prior to the execution of the consignment agreements my company met its obligations with furniture manufacturers and its other creditors in the manner in which it had contracted to meet those obligations. (Tr. 265.) We were not able to carry as much of the better lines as we desired on regular terms simply because our capital would not justify it. We did not have the money. (Tr. 284.)

The invoice and statements for which we sent our notes with the request that the note be accepted in payment had no change in their printed form. The printed form says, I think, 2% 30, or 2% 10, either 2% 10 net 30, or 2% 30 net 60. (Tr. 284.)

We did not have a definite agreement as to the amount of time they would give us on separate invoices. Our arrangement was that they would work with us in carrying the account. It was more or less of a general and indefinite arrangement. We frequently found ourselves unable to pay these notes as they fell due and then we would ask them to grant an extension and allow us to renew the note. (Tr. 285.)

In 1927 we repeatedly discussed with the petitioner firms the desirability from our standpoint of carry-

(Testimony of O. A. Wadenstein.)

ing liberal credit and we tried to get that up as high as we could. We may have specified $15,000 and we proposed to carry that at a 7% interest rate. (Tr. 286.)

In the fall of 1927 I visited Robert W. Irwin and told [32] them something about our plans for this new store, and agreed to pay on their old account I think $2,000 per month. We paid part of it but we did not pay all of that. (Tr. 287, 324, 325, 326.) They wrote us and said if they were to ship this additional order which we had placed with Mr. Ferris for about $15,000 worth of merchandise, then they would like to have the old balance cleaned up but they did not insist upon us paying the old balance. (Tr. 288.)

With Ketcham & Rothschild there was final acceptance on their part of our proposal of standing credit of $15,000 at 7% interest; that was primarily credit to the amount of their merchandise that we expected to carry on our floors. As merchandise was sold out of that we would reorder so as to keep the amount about the same. If it exceeded that we were expected to remit on regular terms. (Tr. 289, 290.)

Prior to the consignment arrangment we received some merchandise from these concerns for which the invoices had the printed "Terms 2% 30 days, or net 60 days" x'd out and there was printed 'terms special," in each instance giving us additional dating. (Tr. 290, 291.)

In the Irwin case we had more merchandise on our

(Testimony of O. A. Wadenstein.)

floor than our indebtedness to Irwin, but in the Ketcham & Rothschild case we owed them an amount in excess of the furniture on our floor. In the Ketcham & Rothschild case we were turning back title to them to all the furniture on our floor. (Tr. 291.) When Mr. Rothschild was here he stayed about three days, went through our store and observed the stock that we were carrying. He went over our inventories or cards to get an approximation of what this furniture on hand amounted to. (Tr. 291, 292.) There was a very slight difference between his approximation and the final inventory. This difference was probably less than $1,000. (Tr. 292.) At the time Mr. Rothschild was out here we had substantial [33] debts owing to other manufacturers of high grade furniture and they were selling to us on open account. It was about October 5, 1928, that we turned our affairs over to Mr. Hills. A very substantial change had taken place in our affairs between March, 1928, and October of that year. We had lost quite a large amount of money. We had moved into a new buiding, had spent quite a little money for advertising and had dissipated the improvements that we had put in our old location. (Tr. 293.) At the time we turned our affairs over to Mr. Hills I cannot say how much money we owed because we had gotten a great many shipments in the new building, and the only way that I could tell would be to check back with the books. A great many of the creditors whom we owed were the same that we had owed when we moved into the new building, and there were some additional creditors. A

(Testimony of O. A. Wadenstein.)

great many of the creditors that we owed when we failed had claims against us that were owing in March 1928. (Tr. 294, 295.) I would guess that 20% of our indebtedness in October, 1928, was the remnant of the indebtedness that we owed in March of that year and had still been unable to pay in the interim. (Tr. 294, 295.) Quite a number of creditors in the interim between March and October, 1928, had enlarged their line of credit for our new store. (Tr. 295.)

During our business it was a common occurrence to get letters from factories in regard to our account and in regard to settlement of notes. We had not received them in any greater number or degree at about the time of March, 1928. (Tr. 299.)

In my letter of December 30, 1927, to Robert W. Irwin Company, I sent a post-dated check for $2,000, and apologized in the letter for having to do it, explaining the difficulties under which we were laboring for cash. (Tr. 315, 316, 325, 326, 288, 289.) In my letter of February 13, 1928, I was sending the Robert W. Irwin Company renewals to take up notes and promised them that [34] we would send them a check some time between then and the first of the month. In my letter of March 6, 1928, to Robert W. Irwin Company we said: "Enclosed please find copy of our last statement. Referring to the accounts receivable, this is our reserve in accounts and contracts which we assigned and which are now carried by the concern from which we are leasing our new building. We have no

(Testimony of O. A. Wadenstein.)

indebtedness at all with the bank." (Tr. 316, 317.)

There was always an exchange of letters in which we asked for more time and we explained it to them. They protested a little bit from time to time. If you would take the regular terms we were always back on our bills. As far back as May, 1927, we wrote them and asked them to accept our renewal notes and told them that we were hopeful that some time in the next few months if we could get our decks cleared we would be able to approximate the maturities of our obligations, but we never were able to accomplish that. (Tr. 324.)

About the first of March Irwin sent us a pretty drastic telegram. Shortly after our reply to that telegram Mr. Rothschild came out here in person from Grand Rapids. (Tr. 327.)

Practically all of the settlements that we made on furniture up to September 5, 1928, were by notes. (Tr. 327, 328.) On the date of September 5, 1928, Mr. Irwin wrote us: "We trust you will not ask us to accept further deferments of these payments in the form of notes because they are all items upon which we have given you extra time allowance." (Tr. 328.) That referred to notes we gave him in settlement of merchandise that had been sold, and these were items that we had sold back to Irwin under the bill of sale and then had sold and we requested them to accept our notes in settlement and which they of course did not want to do. (Tr. 328.)

At the time we made our assignment to Mr. Hills

(Testimony of O. A. Wadenstein.)

our affairs had reached a point where it became necessary to do that. [35] We had no cash to continue business and Mr. Hills was made assignee for the benefit of creditors. (Tr. 426.) At the time of our assignment to Mr. Hills we had a very small amount in the bank; there may have been an overdraft. (Tr. 427.)

There was no question at all that we were operating with too little capital, but it is my firm belief that if we had not moved into the new building we would not have failed. (Tr. 483.) There was not any time up to the time of the actual assignment to Mr. Hills that I did not think that if we closed our stock but what we could pay our bills; but as far as paying all of our bills in the course of our business I don't think there was a time in the history of our business we could have done that. There was not a time in the history of our business when we could pay all our bills and stay in business. (Tr. 485.) Prior to our making our assignment to Mr. Hills I had always been of the opinion that if permitted to do so we could probably pay our debts in full without any loss to creditors. (Tr. 485.) We had always thought that we would never let our business get to the point where we could not pay out 100 cents on the dollar. We were optimistic and enthusiastic about our business. There was a period of time when we thought we had a substantial equity in our business. After the first sixty days in the new building we did not get the expected increase in volume. That carried

(Testimony of O. A. Wadenstein.)

on through until our assignment. Each month it became more clear to me that it was going to be difficult for us to work out that business with the money we had in there. (Tr. 486, 487.) I think it was about September 1, 1928, that we first considered the necessity of making an assignment for the benefit of creditors. (Tr. 490.) On April 1, 1928, we *though* we had a business having an equity of $100,000. The period of five months up to September 1 so revolutionized our ideas that we meditated an assignment. The figures had jumped to [36] a point that we felt it was not safe to continue any longer without some revision of our plans without jeopardizing the interests of our creditors. (Tr. 491.)

As to our ability in March and April, 1928, to pay our bills in accordance with the terms extended us by the people to whom we owed money, will say if the terms were construed literally there might have been some difficulty, but under the elastic plan that I referred to we had had no difficulty with our concerns. As a matter of fact, we did not adhere to those terms, and the reason for that was that we did not have the means and we explained very generally with all the creditors of any amount, we expected them to carry us. It was only under that plan that we would buy. (Tr. 507, 508, 509.) At no time prior to the execution of the consignment agreements had any suit or action been started against the Renfro-Wadenstein Company. Our assignment for the benefit of creditors in October,

(Testimony of O. A. Wadenstein.)

1928, was made entirely at our own suggestion. (Tr. 509.)

After the execution of the consignment agreement subsequent shipments of merchandise by these two concerns were never carried on our books, they were treated as special invoices and placed in a folder which was marked "consignment." After the merchandise was sold it was billed to us and then put on the books as a direct obligation of our corporation. Our books indicate a charging off of the old indebtedness to the two petitioners after the consignment agreement. The approximate date of that charging off on our books was late in April, 1928. (Tr. 272, 273.) The difference between the amount of goods included in the bill of sale and the account which we owed to Robert W. Irwin Company was paid on May 22, 1928. That was the payment for the Phoenix line which we had agreed to keep. (Tr. 274.)

The shipments made by the Irwin Company after April 1, 1928, were made pursuant to the consignment arrangement and the same was the case with Ketcham & Rothschild. The bills of sale which [37] my concern prepared stated items and numbers and gave values or prices for them, which values were the invoice prices of the goods to our concern. We also paid Ketcham & Rothschild Corporation the difference between the goods contained in the bill of sale and the balance of the account which we owed them. We made this payment by two notes shortly after the consignment agreement was entered into. (Tr. 275, 276.)

(Testimony of O. A. Wadenstein.)

At the time of the consignment agreement the goods which had been previously shipped by the two petitioners were carried on our books as having been sold to my concern on open account. After, or at the time of the execution of the consignment agreement those goods were charged back to these respective factories and then carried in our consignment folder. (Tr. 276.)

When Mr. Rothschild was out here it was agreed that we would make reports twice a month reporting sale of consigned goods. Instructions were given to our bookkeeper, Miss Whaley, to report from our sales in accordance with that arrangement. That scheme was not carried out. Our bookkeeper was very much behind in her work and it was not carried out exactly as we agreed to. I think she was quite often behind in her reports. (Tr. 276, 277, 302.) Ultimately we reported the sales of consigned goods that we made by our concern up to a short period before the assignment to Mr. Hills for the benefit of creditors. The only reason that we did not report sales more promptly was because of the fact that Miss Whaley was behind in her work.

I think it was necessary for us to remit by notes for the goods which we reported sold. I can't say in how many instances; the records would have to show. (Tr. 277.) The goods which were shipped to us by these two concerns after the consignment agreement were invoiced "terms special." (Tr. 278.) Prior to the consignment arrangement we

(Testimony of O. A. Wadenstein.)

had received invoices for merchandise shipped by them marked "terms special." (Tr. 291.) [38]

All merchandise is marked by the factory by their own stencil and as a rule a plate. The furniture of these two concerns, as it stood on our floors, further had our price tag which carried the number and as a rule the factory's initials or coded as it would show their initials. It would have been possible to ascertain by the marks on the furniture what furniture belonged to Ketcham & Rothschild and which to Robert W. Irwin Company of our stock of goods. (Tr. 280.)

At the time of filing the petition in bankruptcy the furniture of these two concerns was capable of identification from the furniture of other manufacturing concerns on our floors by the marks I have just indicated. The furniture of these two concerns at the time of filing of the petition in bankruptcy was not segregated from the furniture of other concerns on our floors because it would make a better display intermingled with other lines. (Tr. 281.) We had never bought on consignment from either of these firms before; nor had we bought on consignment from any other furniture company prior to this. (Tr. 290.) We reported the sales that were made from time to time beginning in March, 1928, to these two claimants. They would send us a direct billing for merchandise reported as having been sold. That was invoiced to us on regular terms and we would settle that bill by cash or notes. (Tr. 301.)

(Testimony of O. A. Wadenstein.)

In assigning our accounts to the finance companies we generally had to reserve from 10% to 20%. Probably there would be some accounts that were not assigned at the end of the month. They were assigned at different periods. (Tr. 302.) Practically all of our accounts were assigned to the finance companies. There was no difference in the matter of assigning the accounts after the consignment agreement than there was before. (Tr. 305.)

As our sales were reported to the claimants they billed [39] us as I have testified, and on our side as we sold this merchandise we entered that merchandise on our books in the regular course of business as soon as our bookkeeper could get to it and it was added to our accounts receivable. These claimants were then entered on our books as our creditors to the invoice amount of our merchandise we had sold. (Tr. 306.) We made no distinction in the transactions I have discussed between the merchandise that was transferred back or attempted to be transferred back to the claimants and the merchandise that they subsequently shipped to us; we treated that all the same, in the matter of reporting sales and entering the merchandise on our books. Our arrangement with Mr. Rothschild when he was here was that all this furniture transferred or to be transferred back to them and to Irwin and merchandise subsequently shipped to us was to be reported on monthly. That arrangement went into effect when I signed the consignment contracts. (Tr. 307.)

(Testimony of O. A. Wadenstein.)

There was not any physical moving of the furniture in connection with the transferring of it back to either of the claimants. It was scattered throughout our store and remained scattered and intermingled with other furniture after the consignment agreement was signed by us in the same manner it had remained previously. It had no additional tag on it subsequent to the entering into of these consignment arrangements. These marks that I have described, or plates, were the designation of the manufacturer coupled with our price tag. (Tr. 307.) There was no different character or markings on these pieces of furniture than there was on any other furniture that we had on our floors. All furniture had our price tags and all had something to indicate the manufacturer. (Tr. 308.)

In our settlement with Ketcham & Rothschild there was a difference between the furniture that we were transferring back to them and the amount of our indebtedness. We divided that into [40] three notes, thirty, sixty and ninety days. We felt compelled to ask more time on those notes than had originally been arranged for. (Tr. 311, 312.) On our report of sales they would invoice us and we would send them a remittance sheet either settling by notes or by cash or by both. (Tr. 313.) When invoices were so sent to us we received a discount of 2% if we paid on the 20th of the following month. (Tr. 314.) We did not have any option given us separate and apart from the consignment agree-

(Testimony of O. A. Wadenstein.)

ment whereby we were given the right to return the merchandise at any time.

We fixed the retail price on this furniture, and we paid the freight. We did not segregate the proceeds of sales in any way. (Tr. 319.) We sold out of this furniture in the ordinary course in precisely the same manner that we had sold previously. We gave the customers to whom we sold the furniture at the same credit extensions, the same terms and the same prices that we had made before. There was no difference in the prices that we were required to pay Ketcham & Rothschild or Irwin. (Tr. 320.) Bills of lading were made out directly to Renfro-Wadenstein for all the furniture that was shipped subsequently. (Tr. 320, 321.)

The contract provides for carrying charges of 7%. That is simply an interest charge for the credit on carrying that amount of merchandise. That corresponds to the 7% interest charge that we had arranged to pay them for the line of credit that we had before. (Tr. 321.)

There was some furniture that belonged to us of the Irwin furniture that we did not turn back to Irwin in view of the fact that the amount of Irwin's furniture on hand exceeded the amount that we owed Irwin. We kept the Phoenix line that was referred to in the correspondence. That furniture invoiced approximately $1500. We did not include that in any reports that we made to Irwin. (Tr. 322.) I did not handle those reports personally [41] but I do not think there was any question about it. (Tr. 322, 323.)

(Testimony of O. A. Wadenstein.)

From the 30th of March, 1928, until Mr. Hills took charge under the assignment we continued our retail business precisely as we had conducted it before so far as our selling department was concerned. A great majority of our sales of furniture would include several articles of furniture to the same purchaser, and in some of these instances there would be a piece of Ketcham & Rothschild furniture and a piece of Irwin furniture. (Tr. 424, 425.) We would not distinguish between those in selling the furniture to a purchaser. There would be one invoice and the payments when they came in would be applied on that sale, and the proceeds of those payments would always be put into our bank account. In the case of one of our discount companies we remitted them twice a month for these collections. The collections that we made from sales during all of that period were put in the same bank account and there was no differentiation made by reason of the fact that a purchaser, for instance, had bought several pieces of furniture and included among them would be one or more pieces of Irwin or Ketcham & Rothschild furniture. (Tr. 425.) For instance, if I would sell you a $1,000 bill of furniture, and $200 of that would be Irwin or Ketcham & Rothschild furniture, and you would pay me $250 on account, I would just put that into my bank like any other collection. (Tr. 425, 426.) That money was intermingled and used in our settlements with our discount company and the people that had the assignments of our accounts, and our expenses of operation, etc. We did this all the

(Testimony of O. A. Wadenstein.)

time, from the time this consignment contract was made until the firm was closed. (Tr. 431, 432.)

Our affairs had reached a point where it was necessary to make the assignment to Mr. Hills at the time we did. We did not have any cash to continue the business and Mr. Hills was made assignee for the benefit of creditors. (Tr. 426.) Practically [42] simultaneously with the assignment to Mr. Hills the discount companies employed Mr. Hills to collect the accounts that had been assigned. (Tr. 426, 427.) We may have had an overdraft at the bank at the time of the assignment. (Tr. 427.)

For the furniture that we reported to Irwin and to Ketcham & Rothschild after March 30, 1928, as having been sold by us, we gave principally cash but we gave notes too. I think only in one instance have the notes been returned. The notes were not paid. I have not any way of telling whether they have been returned to me or the bankrupt. (Tr. 428.) As nearly as I can tell just one note was returned to the bankrupt. That was a note that was paid. (Tr. 429.) The unpaid notes which they accepted have never been returned and to the best of my knowledge they still have the notes of the bankrupt. (Tr. 429.)

We did not always pay twice a month to both of these firms the amounts we had sold and collected. We were not always able to do that and consequently we were generally behind. They frequently took that matter up with us. They did not investigate what disposition we were making of the con-

(Testimony of O. A. Wadenstein.)

tracts and open accounts. They knew in a general way how we handled our accounts. We advised them. (Tr. 433.)

Our agreements with these two firms provided, that is, where we gave notes to settle or to evidence the amount of furniture we had sold, that we would likewise give collateral in the assignment of accounts to secure these notes. That however was never done. I think there was one letter in which Mr. Rothschild suggested that that was the plan. I don't think Mr. Irwin ever referred to it. Mr. Rothschild was rather the man who took action in the matter of handling the assignments. (Tr. 434.) As to the note that we gave in settlement of the furniture sold after March 30, 1928, I presume that was treated just the same as all of our [43] notes payable. (Tr. 434.) Under our arrangement with Mr. Rothschild as soon as we sold a piece of furniture of the Rothschild or Irwin make I put that into our assets as soon as the bookkeeper could do it. When this was sold under our plan it was immediately carried, or to be carried, into the assets of our company, and Ketcham & Rothschild or Irwin would send us an invoice showing that that was due with 2% discount the 20th of the following month. (Tr. 435.) Our bills receivable and merchandise accounts were both augmented by the transaction as soon as we sold any of the Irwin or Ketcham & Rothschild manufactured furniture. (Tr. 435, 436.) As a result of such transaction we entered such furniture on our books as an indebtedness then owing Ketcham & Rothschild or to Irwin,

(Testimony of O. A. Wadenstein.)

and balanced that by showing an increase in our receivables. The furniture which was on our floor and described in the so-called bills of sale never left our possession. We always had it. It was on our floor and we simply kept it. It was never re-invoiced back to us in any manner. (Tr. 436, 437.) The only instrument evidencing the return of the furniture to us would be the consignment agreement. That was the only mode of putting the furniture back into our possession. (Tr. 437.)

From the time we had our agreement with Mr. Rothschild in Seattle we were proceeding under the consignment arrangement. That arrangement embraced all the furniture on our floor except the items already referred to in the Irwin case, and also embraced the furniture we expected them to ship in the future. Our possession of the furniture then on our floor thereafter was evidenced only by the terms of the consignment agreement. At the time of this consignment agreement we did not have any other similar arrangement with any other creditors. (Tr. 438.) Outside of the consignment contract we never had any correspondence with the claimants or either of them afterwards in the handling of the matter [44] in which they told us what prices we were to charge. (Tr. 441.)

We specially advised the discount companies with whom we were doing business that we had turned over furniture that was still on our floor to certain creditors but I do not think we advised the general creditors. (Tr. 443.) These two firms, or one of them, sent us literature from time to time ad-

(Testimony of O. A. Wadenstein.)

vertising their furniture. (Tr. 443, 444.) This was for distribution by our firm and it did not give notice or advertise in any way that this furniture did not belong to Renfro-Wadenstein. (Tr. 444.)

We specifically advised the Seattle Discount Corporation, General Discount Corporation and the Sunnyside Finance Company of these consignment arrangements. (Tr. 445.) As nearly as I can recall this was immediately after Mr. Rothschild was out here. (Tr. 446.) None of these finance houses ever made any collections on these customers' accounts. The collections were made by us. The finance houses did not bill the customers for the accounts receivable. (Tr. 446.) Prior to the assignment of our business the finance houses did not at any time notify the customers of the assignments of accounts. (Tr. 446, 447.) Prior to the time of the assignment to Mr. Hills we did not as a practice advise our customers that the customers' accounts had been assigned.

On stated periods as we settled we advised the three finance houses as to what collections were made. If we made a number of collections on some of these assigned accounts on a certain day we would not advise the finance houses that day or the following day nor at all until the next settlement date had arrived. (Tr. 447.) The assignments of the customers' accounts were never placed of record in any way by the assignee nor were they placed of record by us. We settled with the finance houses on an average of twice a month.

(Testimony of O. A. Wadenstein.)

The corporate books of my company and our invoices filed [45] also showed a transfer of the furniture of the furniture in our hands on April 1 back to Ketcham & Rothschild and Robert W. Irwin Company. (Tr. 448.) On our books the merchandise was simply charged back to balance the account so that we would not show that we were owing them. (Tr. 449.) The merchandise covered in the two bills of sale was placed in the consignment folder after the bills of sale were executed along with the furniture subsequently shipped under the consignment arrangement. (Tr. 449.)

As to our being entitled to any discount from either of these petitioners when we remitted by the 20th of the month following sales to our customers, that was covered by the contract. Two per cent is the customary discount. I don't know for sure if the contract provides 2%. If it does it was 2%; if it does not it was not. I advised Mr. Hills, the assignee for the benefit of creditors, of the existence of these consignment agreements. (Tr. 467, 468.)

We had our creditors meeting about noon. I walked back to the office with Mr. Hills and discussed with him the question of consignment accounts among other things. When I walked out of the office I turned him over to our bookkeeper and she had instructions to turn over everything. We did not specially pick them out but they were turned over with other documents. Mr. Hills was cognizant of the names of the consignors. That was on the date of the assignment. (Tr. 468.)

(Testimony of O. A. Wadenstein.)

Almost during the entire history of our business we were making these assignments of accounts to the discount companies and to others. (Tr. 491, 492.) Our business as conducted during the period from March 30, 1928, to the time of the assignment for the benefit of creditors was no departure in any respect in that regard from the mode of doing business that we had conducted at all times except that we were doing business with different finance companies. The percentage of accounts we had discounted remained about the [46] same. (Tr. 492.) Our *modus operandi* with these discount companies did not change in any particular subsequent to March 30, 1928. We still continued to discount all of our paper regardless of what furniture went into the making up of that paper. (Tr. 493.)

In my discussion with the officers of the discount companies concerning the consignment plan, there was never any thought of using these sales as collateral with the companies who were consigning the furniture. Our thought was not to change the method of handling our accounts at all. (Tr. 495.)

We always contemplated that under our arrangement and plan with Irwin and with Ketcham & Rothschild the moment that any of their furniture that they were shipping us or their furniture on the floor was sold, that we would put that in our own receivables and they would bill us direct. (Tr. 495.)

We did not advise the representatives of the discount companies that we had made any arrangements with Ketcham & Rothschild or with Irwin that would prevent our discounting paper in the

(Testimony of O. A. Wadenstein.)

future with those discount companies because we had not made any arrangements. We did not contemplate any arrangements that would prevent our discounting this paper with them, and we don't contend that we had any such arrangement. (Tr. 497.) Our conversations with Mr. Edris and the other representatives of the finance companies were not predicated upon any change that was necessitated in the discount of this paper by any arrangements that we had made with Irwin or Ketcham & Rothschild. We gave the discount companies the information about the consignment merely to keep them informed as to the progress of business. We felt that this was a point that was an advantage to us and naturally would be an advantage to them. Anything that we could do that would simplify the operation of our business and make it easier we knew would be interesting to them, and it was merely from that standpoint I gave them [47] this information. (Tr. 498, 499.) In talking with the representatives of the discount companies there was no discussion as to the method of handling this consignment arrangement. It was merely advice to them that we had made an arrangement whereby we would not have to carry this high-priced merchandise but it would be carried under the consignment plan. We never discussed the point whether it was to be carried only until the furniture was sold. I don't know whether the representatives of the finance companies asked us specifically what we were doing with the accounts after we sold the consignment merchandise. It was just a general prac-

(Testimony of O. A. Wadenstein.)

tice which they knew that we were discounting all our accounts. (Tr. 500.) We continued to discount these contracts and accounts with the finance companies after the bills of sale and the consignment agreements. When such contracts and accounts involved Irwin or Ketcham & Rothschild furniture we expected to pay for that merchandise after it was billed to us on regular account by the factories. (Tr. 501, 502.)

The testimony of Mr. Rothschild and Mr. Irwin that I had discussed the fact that we had been discounting our papers with finance companies is correct. I had discussed with Mr. Irwin and Mr. Rothschild prior to signing consignment agreements. (Tr. 502.)

The assignee for the benefit of creditors carried on the business of the corporation after his appointment for a period of about sixty days. (Tr. 510.) In our talks with the officers of three finance companies we advised them who the consignors were and I think the approximate amount of the consigned goods was mentioned. I could not be sure. (Tr. 510.)

Petitioner's Ex. 18A in the Robert W. Irwin matter is a financial statement of my company sent to Robert W. Irwin Company, dated January 1, 1928; that was prepared by our bookkeeper and is a correct reflection of the financial condition of our concern. [48] (Tr. 245.) That was prepared by our bookkeeper at my request from the books of our concern, turned back to me by the bookkeeper before it was sent to Robert W. Irwin and was examined

(Testimony of O. A. Wadenstein.)

by me when I enclosed it in that letter. I believed it to be a correct statement of the condition of our concern. (Tr. 246.) This represents the condition of our business at that time as far as I know. (Tr. 248.)

Petitioner's Ex. 54 for identification consists of balance sheets that are made up by Racine & Co. from our bookkeeper's trial balance and were generally taken off once a month. (Tr. 449, 450.) The trial balances, from which those documents were prepared, were prepared by our bookkeeper in the usual course of business. (Tr. 450.) I never checked these trial balances prepared by Racine & Co. with the books. My knowledge of the financial affairs were taken from the statements that were from time to time given to me. (Tr. 451.) Any statement that I would make with reference to the value of the corporation of Renfro-Wadenstein on April 1, 1928, would have to be with reference to the documents. (Tr. 454.) I would say that the value of the Renfro-Wadenstein Corporation as of April 1, 1928, was more than $100,000. (Tr. 454, 455.)

(The Trustee objected to the admission in evidence of Petitioner's Ex. 54 for identification upon the ground that the person who prepared them was not offered as a witness. The objection was by the Referee sustained. (Tr. 455, 456.) Thereafter during the examination of witness Morgan, Petitioner's Ex. 54 was received in evidence upon the condition stated by

(Testimony of O. A. Wadenstein.)

the Referee "that it will have to be supported by the trial balances and the authenticity of the trial balances from the books, otherwise it would not be considered.") (Tr. 463.) [49]

As to whether my opinion of the general condition of our business was predicated not so much upon the accountant's analysis of our books as my opinion of the business generally and its possibilities, I think they were both naturally very closely tied together; I don't know how you can very well separate them. (Tr. 488.) My estimate of the value of our business was very largely predicated upon what I felt were its earning possibilities, plus, I would say, the showing we had in our figures. (Tr. 489.) We had spent over $200,000 in the last ten years in advertising and we naturally felt we had created a very big item of goodwill which we valued at the definite figure of $5,000, although we considered it worth more than that. I think up to the time of moving into the new building that we felt with the value of our lease in that location and with our goodwill we probably had a value of $100,000 over the book figures. I doubt if we would have wanted to sell out for any less than that. (Tr. 489.) Our enthusiasm over the future and in view of the fact that we had been carrying on an advertising campaign would have prevented Mr. Renfro and myself, prior to moving into the new location, from selling out for any less than considerably more than the book value. (Tr. 490.) When our plans miscarried we had to revise our figures a bit. Conditions got so bad that we could

(Testimony of Herbert E. Smith.)

not avoid loss to our creditors and in five months they lost a very substantial amount of their claims against the firm. (Tr. 490.)

TESTIMONY OF HERBERT E. SMITH, FOR PETITIONERS.

I am a certified public accountant; at the request of attorneys for petitioners I examined the books of the bankrupt which were in the possession of Mr. Hoffman of S. T. Hills Audit Company and prepared a report from those books and from the papers given me by Mr. Emory, attorney for petitioners. (Tr. 330, 397.) [50] The result of my examination is shown in Petitioner's Ex. 50. From that Ex. 50 I also prepared Ex. 51 and Ex. 52, and I also prepared Ex. 53, which is a reconciliation of my report with that of Mr. Hoffman of S. T. Hills Audit Company.

(Note:

Ex. 50.

Ex. 50 shows the following with relation to

ROBERT W. IRWIN COMPANY

Total merchandise included in bill of sale from Renfro-Wadenstein to Robert W. Irwin Company	$14,490.45
Total invoice price of goods included in inventory submitted by Hills, Assignee (Ex. 48)	20,042.00
Total invoice price of goods to be accounted for	9,502.45

Total invoice price of goods not accounted for 742.25

Ex. 50 shows the following with relation to

KETCHAM & ROTHSCHILD, INC.

Total invoice price of merchandise included in bill of sale from Renfro-Wadenstein to Ketcham & Rothschild, Inc. 11,585.25
Total consigned goods and differences after bill of sale 4,498.75
Total invoice price of goods included in inventory submitted (Ex. 48) 9,848.75
Total invoice price of goods to be accounted for 6,425.75
Total invoice price of goods not accounted for 607.75

Ex. 51.

Ex. 51 shows a total amount of accounts receivable coming into the hands of Assignee S. T. Hills, representing consigned merchandise of

ROBERT W. IRWIN COMPANY

Total balances of accounts receivable 3,066.00
From this should be deducted the following: [51]
(forwarded) 3,066.00
Mrs. Geo. Casey account (being $1075. less $200) 875.00
P. J. Andrae (this item representing furniture sold by Assignee) 165.00

W. D. Harcus (this item representing goods sold by the Assignee) 301.00

Total deductions 1,341.00

Leaving the balance of receivables coming into the hands of the Assignee representing goods sold prior to the assignment .....$ 1,725.00

Ex. 51 shows the accounts receivable coming into the hands of the Assignee representing consigned accounts of

KETCHAM & ROTHSCHILD, INC.

Total receivables 3,018.00

From this should be deducted the following:

Item 10 Harry Turney 490.00

Item 16 S. H. Forbes 315.00

P. J. Andrae (this item representing goods sold by Assignee) 192.00

Total deductions 997.00

Net balance of receivables coming into the hands of Assignee .....$ 2,021.00

Ex. 50 shows that all of the accounts receivable set forth in Ex. 51 had been assigned by the bankrupt to discount companies.

Ex. 52.

Ex. 52 shows with relation to

ROBERT W. IRWIN COMPANY.

Furniture sold by trustee and amounts collected by him thereon 2,062.00

Payments received by Assignee on sales made prior to assignment for benefit of creditors:

Burr Fisher	137.37	
W. L. Harmon	56.40	
A. H. Hutchinson, #1290	20.00	
A. H. Hutchinson, #1359	45.00	
A. A. Murphy	66.90	
W. S. Harcus	100.00	425.67

[52]

Ex. 52 shows with relation to

KETCHAM & ROTHSCHILD, INC.

Furniture sold by Assignee and amounts collected by him on sale thereof 1,593.50

Payments received by assignee on sales prior to the assignment for benefit of creditors:

A. H. Hutchinson, #2368½	125.00	
Thos. Boyd	300.00	
Sadie O'Neill	100.00	
Gaspare Puccio	43.75	
		568.75

(These figures for the Hutchinson items both in Irwin and K.&R. are taken directly from Ex. 50 and do not exactly correspond with the total of the Hutchinson items shown in Ex. 52 at $208.)

(Testimony of Herbert E. Smith.)

Ex. 53.

Ex. 53 is Witness Smith's reconciliation of his audit, with relation to the Irwin merchandise, with that of Mr. Hoffman of S. T. Hills Audit Company. Among other things Ex. 53 shows the following seven items which are the seven disputed items referred to in the stipulation of counsel as to the amount of furniture on hand, to wit:

1 #1348 .....225.00
1 #1348½ 130.00

(These two items being admitted by Mr. Hoffman as having been omitted from his audit. (Tr. 615.)

1 #5000½ 184.00
1 #5024 .....615.00
1 #5202 .....125.00
1 #5204 .....135.00
1 #8978 .....415.00

It is claimed by Witness Smith that all of the said seven items should be added to Mr. Hoffman's figures of the inventory of furniture going into the hands of the Assignee.)

The corrected total of my inventory should be $19,984.50. (Tr. 380.) I included five items totaling $1,474. which Mr. Hoffman did not include. (Tr. 380.) As to each of these five items the difference arose in this way. In my inventory each one of the pieces included in a set is given its own number but in the inventory used by Mr. Hoffman only the first number would be given [53] for several of the pieces. In that way he omitted these five items. (Tr. 380, 391.) I did not familiarize myself

(Testimony of Herbert E. Smith.)

with the factory practice of giving these different articles of furniture specific numbers. (Tr. 404.)

(Note: Witness' testimony on these five items stricken by the Referee (Tr. 384, 388) but the testimony preserved in the record for review.) (Tr. 389.)

There was no way to ascertain from the books what particular piece of furniture payment was made on. Where there were other items in the account cash would be credited without specifying whether it was for this merchandise or for some other. (Tr. 423.)

STIPULATION AS TO AMOUNT OF SO-CALLED CONSIGNMENT FURNITURE.

Reserving to the trustee the right to attack at all times the validity of the instruments, and reserving to the Petitioners the right to introduce evidence concerning seven disputed items of furniture claimed by accountant Smith to have been omitted from the report of accountant Hoffman, it was stipulated in open court between the parties substantially as follows:

KETCHAM & ROTHSCHILD, INC.

Shipments subsequent to consignment agreement	$ 7,047.06
Of said shipments there was furniture on hand at the time Assignee Hills took possession amounting to	4,232.56
Furniture included in the bill of sale and on hand when Assignee Hills took possession	5,751.75

Total furniture on hand when Assignee Hills took possession 9,984.31

IRWIN & COMPANY.

Shipments subsequent to consignment agreement $15,054.00

Of said shipments there was furniture on hand at the time Assignee Hills took possession amounting to 9,993.50

Of said furniture shipped subsequent to consignment agreement, there had been sold, prior to the assignment to Hills, furniture amounting to 5,060.50

[54]

Of the furniture described in the bill of sale, there was on hand, at the time Assignee Hills took possession .....$ 8,391.00

Of the furniture described in the bill of sale, there had been sold, prior to the assignment to Hills 7,099.45

(Tr. 347, 349.)

TESTIMONY OF TRUMAN B. MORGAN, FOR PETITIONERS.

TRUMAN B. MORGAN, witness on behalf of petitioners:

I am a certified public accountant residing in Seattle and employed the principal part of the time with Racine & Co., a firm of public accountants in Seattle which did some accountancy work for Renfro-Wadenstein Corporation during the year 1928 and 1927. (Tr. 459, 460.)

(Testimony of Truman B. Morgan.)

Petitioners' Ex. 54, comprising approximate balance sheets of April 30, 1928, January 1, 1927, November 30, 1927, and December 31, 1927, were prepared by an assistant under my supervision from trial balances made by Renfro-Wadenstein's bookkeeper to Racine & Co. and to myself. (Tr. 460.)

(The Referee permitted these balance sheets to be admitted "with that understanding, that it will have to be supported by the trial balances and the authenticity of the trial balances from the books, otherwise it would not be considered.")

(Note on Ex. 54:

Ex. 54 shows total net worth in the following amounts on the following respective dates:

January 1, 1927	$102,742.97
November 30, 1927	110,710.18
December 31, 1927	100,741.10
April 30, 1928	48,679.91)

In my trial balance for the month of May, 1928, I noticed a shrinkage. (Tr. 464, 465.) [55]

TESTIMONY OF A. WILLIAM HOFFMAN, FOR TRUSTEE.

I am a public auditor and accountant auditing under the style "S. T. Hills Audit Company" and have been familiar with the books of Renfro-Wadenstein and of Mr. Hills as bearing upon the affairs of that company from October 9, 1928, to the present time. (Tr. 589.) I prepared Exhibits "K," "L," "M" and "N."

(Testimony of A. William Hoffman.)

(Note: Exhibit "M" refers to Ketcham & Rothschild and shows the following:

Total of goods sold by Hills as assignee ...1,593.50

Total of goods sold prior to the assignment. (Tr. 594.) 5,854.75

Exhibit "N" relates to Robert W. Irwin Company and shows the following:

Goods sold by Hills as assignee 3,571.00

(This total includes $1,510. sold to Olive Bosworth, which said item is not included in Petitioner's Ex. 52 prepared by Mr. Smith.) (Tr. 595.)

Goods sold prior to assignment .....5,727.45)

The only substantial dispute between the reports which I have submitted and the reports which Smith-Robertson submitted concern the five disputed items of the inventory, to-wit: #5000½, #5024, #5202, #5204, #8978. (Tr. 615.) None of these five items is included in the assignee's inventory. (Ex. 48, Tr. 617.) It is true that I have included in my audit some other pieces as being on hand which are not included in the inventory Ex. 48. (Tr. 622.)

TESTIMONY OF S. T. HILLS, FOR PETITIONERS.

S. T. HILLS, witness on behalf of petitioners, testified:

I am a resident of Seattle engaged in the business of business adjustments and financing business. On October 3, 1928, I was appointed and accepted the

(Testimony of S. T. Hills.)

position as assignee for the benefit of creditors of Renfro-Wadenstein Corporation and at that time took over such assets of the corporation as I could find in the [56] place. I relinquished my position on the appointment of a receiver in the Federal Court. (Tr. 513.) At the request of petitioner's counsel in October, 1928, I prepared Ex. 48, which is an inventory of goods of Ketcham & Rothschild and Robert W. Irwin which were on the floors of Renfro-Wadenstein. (Tr. 515.)

As assignee I made sales and made collections. (Tr. 516.) I think my sum total would possibly be a little less than shown by the Petitioner's Ex. 52. The P. J. Andrae item of $165 on Ex. 52 was subsequently paid on December 17. As to the Bosworth item (see Trustee's Ex. "M") we did not collect any money for that excepting a little balance of 87¢. None of these was sold by me. We were holding them in trust, you might say, awaiting their orders to deliver. (Tr. 521.) We sold item 2428–L to P. J. Andrae for $192 on October 10, 1928, and received the money on December 12, 1928. (Tr. 521, 522.) I have a detailed record of all my cash transactions from October 3. This record is divided in this manner:—Cash receipts, accounts receivable, distribution, Renfro-Wadenstein unpledged, Seattle Discount Corporation, General Discount Corporation, contingent (that meaning those accounts that have been assigned to two or more finance companies). (Tr. 524, 525.)

Some collections made by me were deposited in the funds of Grass representing those accounts

(Testimony of S. T. Hills.)

which were sold to Grass by the Trustee. (Tr. 527.) I turned over to Mr. McLean, the receiver, $2,935.88 in cash. The report of Mr. McLean as receiver shows that he turned over to the Trustee $5,321.22 in cash; that comprised the amount that I turned over to him together with additional collections which I made as his employee from the time of his appointment, November 16, to the time of the election of the trustee. None of these additional collections involve furniture here in dispute. (Tr. 529.) I was making some collections not in my capacity as assignee for the benefit of creditors of Renfro-Wadenstein Corporation [57] but as an agent for these finance houses to whom accounts receivable had been assigned. (Tr. 553.) When we collected anything for the discount companies we kept it distinctly separate and apart until the appointment of the receiver, in fact, during our administration pending any litigation or claim to the contrary. (Tr. 553, 554.) We deposited it in a bank prior to the time I turned it over to the receiver. I will qualify that by saying that there was some of it paid at my office, 801–4th Avenue, in fact, quite a large sum of it of the Seattle Discount Corporation. I deposited separately under separate signatures the collections which we made while I was physically in the bankrupt's office. I had a bank account styled "S. T. Hills, Assignee for the benefit of creditors for Renfro-Wadenstein." All the collections which I have mentioned were deposited in that account except the Burr Fisher collection which was placed in a trust account. (Tr. 554, 555.)

(Testimony of S. T. Hills.)

None of the items on Ex. 2 was collected by me as agent of the discount corporations other than the Burr Fisher. (Tr. 555.) After the time I took over the affairs of the bankrupt I made no assignments of the accounts receivable for furniture which was subsequently sold, to the finance corporations. (Tr. 555.) The second sheet of Ex. 52 shows five items representing furniture sold prior to the assignment for the benefit of creditors, and for which I made collections. The collections, I rather think, were made in both capacities, that is, by me as assignee and as agent for the discount corporations. Each of these items had been assigned to a discount corporation. (Tr. 556, Ex. 52.)

Petitioner's Ex. 51 contains a correct statement of the balance of accounts receivable at the time of my going in as assignee. (Tr. 559.) Upon my taking over my duties as assignee I was not advised of the consignment agreements by Mr. Wadenstein; I discovered that myself. One of the salesmen told me that he [58] thought the Ketcham & Rothschild goods were on consignment. I immediately referred to the ledger of Ketcham & Rothschild and found the open acount on the books with no record on the ledger sheet. I dismissed it from my mind as a consignment. It was not until Mr. Emory, attorney for petitioner, called upon me in person and asked that the goods be delivered to his client that I began to search the letter files and found no record of a consignment. However, upon Mr. Emory's assurance that there was a consignment I went through the files and finally dug up a letter and copy

(Testimony of S. T. Hills.)

of a purported consignment of the account. (Tr. 560, 561.) After Mr. Emory requested me to make an inventory of the goods that the petitioners claim, I had them tagged and specially marked with a tag "Hold—do not sell"; they were not segregated until about the time of the appointment of a receiver, and fearing there might be some misunderstanding we moved them on to the fourth floor, and the goods were so held and tagged up to the time of the filing of the petition in bankruptcy. (Tr. 561.)

While I was assignee there was no segregation of the collections at any time except the segregation that I have testified to and except the segregation on the finance company assigned discount accounts. The other proceeds of sales and collections were intermingled in one fund and were drawn on for the expenses of administration, salaries, wages, and the like. (Tr. 563.)

My appointment as assignee for the benefit of creditors was the result of a series of meetings among committees of creditors going over a period of about one month prior to my appointment. (Tr. 563, 564.) Mr. Wadenstein or Mr. Renfro participated in those meetings and the corporate condition was discussed very thoroughly. At the time I took charge as assignee there was a very substantial overdraft but there may have been some cash on hand because all checks were stopped in payment. (Tr. 564.) The [59] amount of cash was $308.68. The overdraft ran between $5,000 and $6,000. (Tr. 565.) The only two accounts on

(Testimony of S. T. Hills.)

Petitioner's Ex. 51 which were sold by me as assignee are No. 9, W. D. Harcus, and also the P. J. Andrae item, at the bottom of the page. (Tr. 566.) Ex. "M" and Ex. "N" were prepared under my instructions from the records and ledgers of Renfro-Wadenstein and from records of S. T. Hills as assignee. The tabulations in Ex. "M" and Ex. "N" are correct. (Tr. 568, 572, 573, 577.) Exs. "M" and "N" disclose all the accounts and contracts that are here in question that have been assigned to discount companies and others (Tr. 570) and a statement of the goods sold by me while I was assignee. (Tr. 577.) As to whether all of the payments shown on Mr. Smith's audit as paid to the trustee or assignee were paid to me in that capacity or whether some of them were paid to me and received by me as agent for the discount companies I would be unable to segregate the exact amounts. (Tr. 570.) Immediately after the assignment and true condition of Renfro-Wadenstein was learned the Seattle Discount Corporation employed my office at 801–4th Avenue to send out notices to all accounts which they had purchased including all installment and open accounts, that their account was owned by the Seattle Discount Corporation and that future payments were to be made at 801–4th Avenue. If people came to the store of Renfro-Wadenstein and as a matter of convenience wished to pay their account there we took the money, or the clerks did—the assignee did at the place of business of Renfro-Wadenstein Company, and then

(Testimony of S. T. Hills.)

it was accounted for through our office at 801–4th Avenue. (Tr. 570, 571.) I did not check the records personally to ascertain just what goods of both firms had been sold prior to the assignment but relied on Mr. Hoffman. (Tr. 578.)

After I went in as assignee I made certain collections as assignee for the benefit of creditors and certain collections [60] as agent for these finance companies (Tr. 585), and these collections were endorsed on the corporate books without any distinction as to the capacity in which I made those collections. (Tr. 585, 586.) I was really acting in a dual capacity as assignee for the benefit of creditors and as agent for these discount corporations. (Tr. 586.) The Turney account was assigned to Atiyeh Brothers in Portland for an indebtedness that the bankrupt corporation owed it at the time of the assignment; this assignment was made before I went in as assignee. (Tr. 587, 588.)

TESTIMONY OF WILLIAM EDRIS, FOR TRUSTEE.

WILLIAM EDRIS, witness on behalf of Trustee: I am president of Seattle Discount Corporation. For some two or three months previous to their moving into their building at 5th and Pike, and thereafter, my company financed their accounts. In discounting their paper which included both contracts and open accounts, we would advance 90% to the bankrupt. (Tr. 531.) Those accounts and

(Testimony of William Edris.)

contracts would disclose the name of the purchaser and the various articles of furniture and the purchase price and probably the date when they were sold. (Tr. 531, 532.) The contracts which were assigned to us did not disclose the name of the manufacturer of the furniture. As to the open accounts assigned to us, I was handed an invoice such as is usually sent out by stores and on the left-hand side of the invoice there was a column in which was designated various letters and numbers designating the stock number, but it was of no information to me nor did I know what it signified. (Tr. 532.) An entire account would be assigned to us and there would be no segregation of different pieces of furniture out of the account assigned. (Tr. 533.) Mr. Wadenstein did not at any time prior to the assignment for the benefit of creditors advise us of any consignment arrangement with [61] either Ketcham & Rothschild or Irwin. (Tr. 533, 534.) We continued to discount the bankrupt's accounts and contracts down to within three days of the assignment to Mr. Hills. Prior to the assignment to Mr. Hills I did not receive any knowledge or information from any source that any merchandise on the bankrupt's floor was claimed to be consigned merchandise. (Tr. 534.) I thought I was familiar with the bankrupt's business affairs but I was mistaken. (Tr. 534.) Either prior to leasing them the space in the new building or loaning them money on their assignments I talked very extensively with Mr. Wadenstein and Mr. Renfro

(Testimony of William Edris.)

(Tr. 534, 535) respecting statements that Mr. Wadenstein had purporting to be balance sheets. I did not go over the books. (Tr. 535.) I had no idea that any of these accounts which my concern was discounting covered merchandise which had previously been consigned by manufacturers to the bankrupt corporation. (Tr. 535.) I permitted the bankrupt to make collection on these accounts receivable with limitations. My discount corporation did not at any time from the moving of the bankrupt to their store up to the time that Mr. Hills went in as assignee make any collections on any accounts receivable or any contracts which were assigned to my corporation by the bankrupt, but the bankrupt would make the collections as my agent specifically and definitely appointed for that purpose. No notification of the assignment was given to the customer whose accounts or contracts were assigned. (Tr. 538.) With several exceptions which we found after we got into the books, the proceeds of the collections were placed in the general funds of the bankrupt corporation and our concern was remitted to at stated intervals by Renfro-Wadenstein. (Tr. 539, 540.) Under our arrangement with the bankrupt they were to remit to us twice a month for the sums advanced in discounting the accounts receivable. They made that remittance with their own check. (Tr. 540.) I don't remember the exact date [62] that we appointed the bankrupt corporation as our agent to collect these receivables. (Tr. 540, 541.)

TESTIMONY OF C. H. BAILEY, FOR TRUSTEE.

C. H. BAILEY, witness on behalf of Trustee: In 1928 I was secretary of General Discount Corporation; my firm began to discount the accounts and contracts of Renfro-Wadenstein over six months, possibly longer, before Renfro-Wadenstein moved into their last store on 5th and Pike. (Tr. 542.) We continued to discount their contracts and accounts until up to the last. In the accounts that were assigned to us under that arrangement there was no segregation of furniture out of an account. We would take an assignment of an entire bill. (Tr. 543.) We were not advised of anything concerning the consignment arrangements of the bankrupt with Irwin Company and Ketcham & Rothschild. (Tr. 543.) It is not a fact that Mr. Wadenstein called at our office and explained it to me. (Tr. 544.) It was some time after the failure that I first learned that it was claimed that the Irwin and Ketcham & Rothschild furniture was consigned furniture and not sold by the factories outright to the bankrupt. Nobody of the General Discount Corporation knew of these financial agreements prior to the time I have just stated. I had personal charge of these assignments and handled them solely. On the assigned accounts receivable which we would take there was not to my knowledge any designation of the names of the manufacturer of a particular article. In some cases I think that a

(Testimony of C. H. Bailey.)

number would be placed opposite the particular article. We would have no way of telling where the article came from. It would simply state what it was. (Tr. 544, 545.) I do not think my concern took any assigned accounts after Mr. Hills went in as assignee for the benefit of creditors. (Tr. 545.) [63]

(Here it was stipulated between counsel that a bill of sale in conformity with and substantially following the wording of the order of court, was executed by the trustee in bankruptcy transferring assets to Robert Grass.) (Tr. 546.)

The General Discount Company did not advance the money to Mr. Grass to purchase the assets from the trustee. (Tr. 547.) The money for the purchase was advanced through A. E. Pierce. Mr. Pierce is president of our company. I could not say whether Mr. Edris contributed some of the money. (Tr. 548.) Nor could I say whether the Seattle Discount Corporation advanced some of the money used for the purchase of the assets from the Trustee. I do not know. (Tr. 549.) I do not think Robert Grass advanced the money. (Tr. 549.) The bankrupt remitted to my concern whenever the account was due. (Tr. 549.) That was practically every day. It might be only once a week. No notice of the assignment was given by my concern to the customer whose account or contract was assigned. (Tr. 550.) A. E. Pierce has numerous activities. He is secretary of the Home Savings & Loan Association and is interested in

(Testimony of C. H. Bailey.)

other firms or loan associations including Washington Loan & Securities Co. and Graham & Pierce. (Tr. 550.) The General Discount Corporation did not conduct a sale of the assets which were purchased from the trustee in bankruptcy. I could not say whether it did through its agent. (Tr. 551.) The General Discount Corporation did not receive in whole or in part the proceeds of the sale of the furniture which was a part of the assets purchased from the trustee in bankruptcy. (Tr. 551.) It did receive from those proceeds just the proceeds from the accounts that we had purchased previously from Renfro-Wadenstein. (Tr. 551, 552.)

(End of Summary of Evidence.) [64]

From the records, files, and testimony, I find the facts to be as follows:

FINDINGS OF FACT.

1.

For about five years prior to March, 1928, petitioner, Robert W. Irwin Company, engaged in the manufacture of furniture at Grand Rapids, Michigan, had been selling furniture on open account to the bankrupt, Renfro-Wadenstein, engaged in the retail furniture business at Seattle.

2.

In November, 1927, the bankrupt owed Irwin Company approximately $20,000.00, of which approximately $8,000.00 was for goods shipped during 1927 and the balance was for goods shipped prior to 1927.

3.

As a result of Irwin Company's efforts to get the account in better shape, Mr. Wadenstein, president of the bankrupt corporation, went to Grand Rapids in November, 1927, and there arranged with Irwin Company to liquidate the account by paying $2,000.00 per month beginning in November, 1927.

4.

After this arrangement the bankrupt made only two payments—one of $2,000.00 in November and one in December, 1927; and made no further payments on any account to Irwin Company until some time in April after the bankrupt had signed the so-called consignment agreement hereinafter mentioned.

5.

In March, 1928, Irwin Company received through its traveling salesman, Mr. Ferris, an order from the bankrupt for over $15,000.00 of goods, but refused to make any shipment until further payments should be made on the existing indebtedness. [65]

6.

Mr. Rothschild, president of petitioner Ketcham & Rothschild, then a merchandise creditor of the bankrupt, conferred with Irwin in New York and Grand Rapids concerning the bankrupt's business situation and its accounts with the two petitioners. Mr. Rothschild, after the conference in Grand Rapids, proceeded on to Seattle to look into the situation and take some action on behalf of his

own company and on behalf of the Irwin Company subject to the latter's approval. He arrived in Seattle in March, 1928, and remained about three days.

7.

The bankrupt, as a result of its officers' conferences with Mr. Rothschild at this time, signed the following two written instruments: (a) A so-called consignment agreement (Irwin's Ex. 27) which now bears date April 1, 1928, providing that Robert W. Irwin Company at its option should furnish goods to the bankrupt on the terms and conditions therein set forth, and (b) a letter (Irwin's Ex. 26) addressed to Robert W. Irwin Co., dated March 23, 1928, referring to said so-called consignment agreement, and particularly to paragraph nine thereof.

8.

Paragraph nine of the so-called consignment agreement stated and provided that the bankrupt had in its possession certain goods "as per attached list" which had theretofore been sold and delivered to the bankrupt by the Irwin Company on credit and had not been paid for, that the title to said goods "is hereby transferred and conveyed back" to Irwin Company, and should thereafter be treated as having been delivered to the bankrupt "on consignment and under and subject to all the terms and conditions of this contract"; and that in consideration of said transfer and conveyance of the title of said goods back to Irwin Company, "that

[66] company (Irwin) does hereby cancel" the indebtedness of the bankrupt for said goods.

The letter of March 23rd referred to said paragraph nine of the so-called consignment contract and provided, in substance, that the bankrupt would furnish, shortly after the first of the month, an inventory of Irwin Company's merchandise on hand, and would also furnish a "bill of sale which will act as a transfer back to your Company (Irwin) of this merchandise" and that any difference in the amount of the account would be taken care of in three equal payments, thirty, sixty and ninety days.

9.

The letter of March 23, 1928, together with two copies of the so-called consignment agreement, were sent to Irwin Company, who received them about March 27th or 28th. When Mr. Irwin received these copies of the contract the date was blank. He wrote in the date April 1, 1928, and executed the contract immediately on behalf of his company but retained both copies of the contract in his possession until September 5, 1928, when he sent one of them back to the bankrupt.

10.

The bankrupt executed and sent to Irwin a bill of sale (Irwin's Ex. 28) dated August 6, 1928, transferring the items of furniture therein named to Irwin Company. On September 5th Irwin Company accepted this bill of sale and sent to the bankrupt one of the executed copies of the so-called consignment agreement. Up to that time Irwin

had been having correspondence with the bankrupt and had held both copies of the so-called consignment agreement on his desk pending the getting of a correct list of goods that Irwin Company was to take back title to under paragraph nine of the agreement. [67]

11.

The bill of sale dated August 6th was never filed for record.

12.

After the execution of the so-called consignment agreements and bills of sale the petitioners respectively credited the bankrupt's account with the value of goods set forth in the respective bills of sale.

13.

Irwin Company on August 20, 1928, which was prior to accepting the bill of sale, made its last shipment of goods to the bankrupt.

14.

At the time bankrupt signed the so-called consignment agreement and at all times thereafter all the furniture of Irwin Company and of Ketcham & Rothschild make in the possession of the bankrupt was intermingled with other furniture. There was no physical change of possession of this furniture from bankrupt to either of the petitioners, and no segregation of any kind.

15.

The bankrupt was unable and failed to pay its obligations in due course of business and was in-

solvent at all times from prior to November 1927 until it made the assignment for the benefit of creditors. These facts were known to both petitioners during all said period.

16.

All shipments of furniture made by each petitioner to the bankrupt after March 30, 1928, were made directly on bills of lading to the bankrupt in the same manner that shipments had been made prior to the execution of the so-called consignment agreements. [68]

17.

The invoices of each petitioner for goods shipped to the bankrupt after March 30, 1928, were marked "terms special." The same phrase had been used on some invoices of goods shipped by each petitioner prior to March 30, 1928.

18.

The furniture held and received by the bankrupt under the so-called consignment agreements was not segregated at any time but was intermingled with the bankrupt's furniture on display. The so-called consignment furniture bore tags or marks indicating by what factory it was made, but bore no mark indicating that it was consigned furniture or that it was not the property of the bankrupt.

19.

The bankrupt kept in a separate folder, designated a consignment folder, the invoices for furniture held by or shipped to the bankrupt under the so-called consignment agreements with each of the petitioners. There was nothing in the bankrupt's

books of account to show that it held any goods under consignment.

20.

Each petitioner carried a consignment account with the bankrupt on its books.

21.

The petitioners, respectively, carried so-called consignment accounts with bankrupt, and upon receiving a report from the bankrupt of a sale by it of any items of consigned furniture, would make a direct charge against the bankrupt therefor.

22.

The bankrupt did not make to either petitioner the periodical reports as required by the so-called consignment agreements. [69]

On August 4, 1928, the bankrupt wrote to Irwin Company enclosing a report of sales with two notes in payment of the goods sold. This was the only report, and the only payment or attempt to make payment of any kind, made by the bankrupt to Irwin Company under the so-called consignment agreement. The said notes had not been paid and were still held by Irwin Company after the adjudication in bankruptcy herein.

23.

A bill of goods sold by the bankrupt to a single customer would include so-called consigned goods of both petitioners together with other furniture. The contract or account receivable representing such sale to the bankrupt's customer would not segregate the so-called consigned furniture of either

of the petitioners from that of the other petitioner or from any other furniture.

24.

The bankrupt would deposit in its bank account the proceeds of sales of so-called consigned furniture and other furniture and would draw on said bank account for its operating expenses and other needs. There was no segregation of the moneys received on account of the so-called consigned furniture.

25.

On the occasion of opening its new place of business the bankrupt published in the newspaper certain advertising which contained announcements of the opening, and of its having for sale furniture of the manufacture of both of the petitioners. This advertising was published with the financial assistance of both petitioners and with their knowledge of its text. Said advertising contained no statement that the furniture of petitioners' manufacture in which the bankrupt was dealing was held on consignment.

26.

Beginning some time prior to March 30, 1928, and continuing [70] until the assignment for the benefit of creditors, the bankrupt made a practice of discounting and assigning its contracts and accounts receivable to discount companies or finance companies; that practice was known to both petitioners both before and after the bankrupt signed the so-called consignment agreements.

27.

The discount companies at the time of the assignments of bankrupt's contracts and receivables to them, had no knowledge that said contracts and accounts represented any goods received or claimed to have been received, by the bankrupt on consignment.

28.

On October 3, 1928, Renfro-Wadenstein made an assignment to S. T. Hills for the benefit of its creditors.

29.

While assignee Mr. Hills sold some of the furniture, and acting in the dual capacity as assignee and as the agent of the discount companies collected the bankrupt's contracts and accounts receivable. The proceeds of the collections on the contracts and accounts which had been assigned to the discount companies were kept separate and apart. There was, with a minor exception, no other segregation of proceeds of collections.

30.

After the assignment to Hills both petitioners made demand on him through their attorney for the return of the furniture claimed by them to have been consigned.

31.

The petition in bankruptcy was filed October 19, 1928; the order of adjudication was entered November 9, 1928; J. L. McLean was appointed receiver November 15, 1928; and W. S. Osborn was elected and qualified as trustee November 21, 1928. [71]

32.

(a) The amount of furniture included in the bankrupt's bill of sale to Irwin Co. was $14,490.45

The amount of furniture shipped by Irwin Co. to bankrupt subsequent to Apr. 1, 1928..... 15,409.00

Total of Irwin so-called consigned furniture $29,899.45

(b) The amount of Irwin so-called consignment furniture delivered to the Trustee in Bankruptcy was..$18,739.50

This included furniture described in the bankrupt's bill of sale to Irwin Co. amounting to .....$ 8,391.00

And furniture shipped by Irwin to bankrupt subsequent to April 1, 1928 amounting to.....10,348.50

$18,739.50

(c) The Trustee in Bankruptcy received contracts and accounts receivable representing Irwin so-called consignment goods (including both goods described in the bill of sale and goods shipped subsequent to the so-called consignment agree-

ment) theretofore sold to the bankrupt amounting to .....$ 1,725.00
The said receivables mentioned in this subdivision (c) were not collected prior to the bankruptcy. (See Petitioner's Ex. 51.)

33.

Hills as assignee.

(a) Received payments on Irwin so-called consignment furniture (including furniture described in the bill of sale and that shipped subsequent to the purported consignment agreement) sold by the bankrupt prior to the assignment for the benefit of creditors in the sum of .....$ 425.67

(b) And sold certain Irwin so-called consignment furniture (including furniture described in the bill of sale and furniture shipped subsequent to the purported consignment agreement) for which there was collected by the assignor, receiver and trustee, the sum of .....$ 2,062.00

34.

(a) The amount of furniture included in the bankrupt's bill of sale to Ketcham & Rothschild was $11,585.25

(b) The amount of furniture shipped by Ketcham & Rothschild to bank-

rupt subsequent to March 30, 1928 was .....$ 7,047.06

Total of Ketcham & Rothschild so-called consigned furniture $18,632.31

[72]

(b) The amount of Ketcham & Rothschild so-called consignment furniture delivered to the Trustee in Bankruptcy was .....$ 9,984.31

This included furniture described in the bankrupt's bill of sale to Ketcham & Rothschild amounting to.....$5,751.75

And furniture shipped by Ketcham & Rothschild to bankrupt subsequent to March 30, 1928, amounting to 4,232.56

$ 9,984.31

(c) The Trustee in Bankruptcy received contracts and accounts receivable representing Ketcham & Rothschild so-called consignment goods (including both goods described in the bill of sale and goods shipped subsequent to the purported consignment agreement)

theretofore sold by the bankrupt amounting to .....$ 2,021.00

These contracts and accounts receivable mentioned in this subdivision (c) were not collected prior to the bankruptcy.

35.

Hills as assignee.

(a) Received payments on Ketcham & Rothschild so-called consignment furniture (including furniture described in the bill of sale and furniture shipped subsequent to the purported consignment agreement) sold by the bankrupt prior to the assignment for the benefit of creditors, in the sum of .....$ 568.75

(b) Sold certain Ketcham & Rothschild furniture which was included in the bill of sale to Ketcham & Rothschild for which there was collected by the assignee, receiver and trustee, the sum of .....$ 1,593.50

36.

Hills as assignee turned over to McLean as receiver cash in the sum of .....$ 2,935.88

37.

The trustee in bankruptcy, under order of court sold practically all the furniture and receivables

in his hands to Robert Grass, trustee (for principals unnamed) for $150,000 cash.

38.

It was stipulated December 5, 1928, between the petitioners and trustee herein that (a) the sum of $21,783.55 out of the purchase price paid by Robert Grass shall stand in lieu of [73] the merchandise claimed by petitioners and shall be impressed with every right which they had at the date of bankruptcy and at the date of the stipulation; (b) and that the sum of $9,874.05 out of the purchase price paid by Robert Grass shall stand in lieu of the unpaid accounts receivable and proceeds of other accounts receivable claimed to have been collected by S. T. Hills as assignee, in lieu of the accounts receivable and collections on other accounts receivable claimed by petitioners and shall be impressed with every right which petitioners had at the date of bankruptcy and at the date of the stipulation.

39.

The bankrupt did not at any time subsequent to March 30, 1928, assign its receivables to either of the petitioners as collateral for any notes given to petitioners for so-called consignment goods.

I further find the following facts with relation to

KETCHAM & ROTHSCHILD, INC.

40.

For several years prior to March, 1928, petitioner,

Ketcham & Rothschild, Inc., engaged in the manufacture of furniture at Chicago, Illinois, had been selling furniture on open account to the bankrupt Renfro-Wadenstein.

41.

In the year 1927 and until Mr. Rothschild's visit to Seattle in March, 1928, the bankrupt had an arrangement with Ketcham & Rothschild for a so-called "frozen credit," whereby Ketcham & Rothschild granted to bankrupt a standing credit of whatever sum the bankrupt might have invested in samples of Ketcham & Rothschild goods, up to $15,000.00, the bankrupt to pay interest at the rate of 7% per annum for the use of said credit. Any merchandise the bankrupt bought in excess of $15,000.00 or that was not to be on its floor would be paid for by the bankrupt on the usual terms. [74]

42.

At the time of Mr. Rothschild's conference with Mr. Irwin in March, 1928, the bankrupt owed Ketcham & Rothschild approximately $16,000.00 or $17,000.00, all of which was evidenced by the bankrupt's notes. At the same time there were pending orders from the bankrupt for goods, which said orders had not then been filed.

43.

The so-called consignment agreement (Petitioner's Ex. 1) and the letter dated March 23, 1928, were signed and delivered to Mr. Rothschild by the bankrupt on March 23, 1928, in Seattle. Ketcham & Rothschild signed the contract in Chicago on

March 30, 1928, and inserted that date in the instrument.

44.

No list of goods (referred to in paragraph 9 of the agreement) was attached to the contract at any time. At the time bankrupt signed the contract it furnished to Mr. Rothschild a memorandum of its stock cards and records. Upon this basis the parties took an approximate figure of the amount of goods of Ketcham & Rothschild *make then* in the possession of the bankrupt; the figure so taken did not differ far from the figure later agreed on when the bill of sale was given.

45.

On April 16, 1928, bankrupt executed and delivered to Ketcham & Rothschild a bill of sale for the goods on hand at the time of the execution of the so-called consignment agreement, and this bill of sale was filed April 24, 1928, for record in the office of the Auditor of King County, Washington.

46.

The bankrupt made some reports of sales but did not make these reports as required by the contract of March 30, 1928. The bankrupt paid Ketcham & Rothschild for all goods which the bankrupt reported sold. All these payments were made in cash with the exception of one payment which was made by note. [75]

From the evidence and records herein, I make the following

CONCLUSIONS.

1.

That the petitioners knowing the bankrupt's insolvency were concerned as to the collectibility of their accounts and entered into the so-called consignment agreements to obtain security for the then existing indebtedness and for the payment for any goods to be shipped thereafter.

2.

It was the intention of all the parties to make of the so-called consignment agreements a fraudulent concealment of actual sales.

3.

The so-called consignment agreements were contracts for sales and were not contracts of consignment or bailment.

4.

The so-called consignment agreement between the bankrupt and Irwin Company was not accepted by Irwin Company until September 5, 1928, which was subsequent to the completion and termination of all shipments of goods made by Irwin & Company to the bankrupt.

5.

There was no transfer of the possession or control from bankrupt to either petitioner of any goods of petitioners' manufacture which were in the bankrupt's possession on March 30th and April 1st, 1928.

6.

The bill of sale from bankrupt to Irwin Company was never filed for record and consequently was invalid as to the Trustee in Bankruptcy. [76]

7.

There was no consideration for any bill of sale from the bankrupt to the petitioners, except the cancellation of antecedent indebtedness of the bankrupt to the petitioners.

8.

Each bill of sale from the bankrupt to the petitioners was made while the bankrupt was insolvent, and without present consideration to the bankrupt, and was invalid as against the Trustee in Bankruptcy.

9.

The bankrupt at all times had unfettered possession, dominion and control over all the so-called consignment furniture of both petitioners, and over the proceeds thereof.

10.

Neither petitioner has any right, title or interest in any of the so-called consignment furniture nor in any of the proceeds thereof.

11.

Each of the petitioners is a general creditor and is not entitled to reclaim any of the so-called consignment furniture nor the proceeds thereof. [77]

QUESTIONS PRESENTED ON REVIEW.

The following questions relating to the petition of Ketcham & Rothschild and the petition of Irwin & Company, respectively, are presented on review:

Ketcham & Rothschild.

1. Was the contract dated March 30, 1928 (K. & R. Ex. 1) a contract of consignment or a contract for sale.

2. If it was a contract of consignment what property was affected by such consignment.

(a) By virtue of said contract did Renfro-Wadenstein become bailee of the goods shipped by Ketcham & Rothschild subsequent to the execution of the contract only, or

(b) Did Renfro-Wadenstein also become bailee of all the goods of Ketcham & Rothschild's manufacture which were in Renfro-Wadenstein's hands at the time the contract was executed.

3. In determining whether the title to the goods in Renfro-Wadenstein's possession and ownership at the time of the execution of the contract passed to Ketcham & Rothschild as against the Trustee in Bankruptcy, the following questions arise:

(a) Was the letter of March 23, 1928, a part of the contract of March 30, 1928.

(b) Was the transfer of title of Ketcham & Rothschild effected *in praesenti* by the contract of March 30th or was it effected by the bill of sale delivered April 16, 1928, and filed April 24, 1928.

(c) Was the instrument transferring the title recorded within ten days after the sale was made.

(d) Was the said property, which was attempted to be transferred by Renfro-Wadenstein to Ketcham & Rothschild, "left [78] in the possession" of Renfro-Wadenstein within the purview of Sec. 5827 of Rem. C. S.

(e) Was Renfro-Wadenstein insolvent at the time it attempted the transfer of its property to Ketcham & Rothschild.

(f) Was there any present consideration for such transfer or was the only consideration the satisfaction of an antecedent indebtedness.

4. If Ketcham & Rothschild as consignor retained title to the furniture did it also have and retain title to those receivables consisting of open accounts and contracts representing the proceeds of resales by Renfro-Wadenstein.

Irwin & Company.

1. Was the contract dated April 1, 1928 (Irwin's Ex. 27) a contract of consignment or a contract for sale.

2. If it was a contract of consignment when did it go into effect and what property was affected by such consignment.

(a) By virtue of said contract did Renfro-Wadenstein become bailee of the goods, if any, shipped by Irwin & Co. subsequent to the effective date of the contract only, or

(b) Of all the goods shipped subsequent to the execution of the contract, or

(c) Did Renfro-Wadenstein also become bailee of all the goods of Irwin & Co.'s manufacture which were in the possession and ownership of

Renfro-Wadenstein at the time the contract was executed.

3. In determining whether the title to the goods in Renfro-Wadenstein's possession and ownership at the time of the execution of the contract passed to Irwin & Co. as against the Trustee in Bankruptcy, the following questions arise:

(a) Was the letter of March 23, 1928, a part of the [79] contract of April 1, 1928.

(b) Was the transfer of title to Irwin & Co. effected *in praesenti* by the contract of April 1, 1928, or was it effected by the bill of sale dated August 6, 1928 (Irwin's Ex. 28), which was never recorded.

(c) Was the said property, which was attempted to be transferred by Renfro-Wadenstein to Irwin & Co. "left in the possession" of Renfro-Wadenstein within the purview of Sec. 5827 of Rem. C. S.

(d) Was Renfro-Wadenstein insolvent at the time it attempted the transfer of its property to Irwin & Co.

(e) Was there any present consideration for such transfer or was the only consideration the satisfaction of an antecedent indebtedness.

4. If Irwin & Co. as consignor retained title to the furniture did it also have and retain title to those receivables consisting of open accounts and contracts representing the proceeds of resales by Renfro-Wadenstein.

PAPERS TRANSMITTED.

I transmit herewith for the information of the Judge the following papers:

1. Petition of Robert W. Irwin Company for reclamation.
2. Answer of trustee to petition of Robert W. Irwin Company.
3. Reply of Robert W. Irwin Company to answer of trustee.
4. Petition of Ketcham & Rothschild for reclamation.
5. Answer of trustee to petition of Ketcham & Rothschild.
6. Reply of Ketcham & Rothschild to answer of trustee.
7. Referee's order denying petition of Robert W. Irwin Company. [80]
8. Referee's order denying petition of Ketcham & Rothschild.
9. Exceptions of Robert W. Irwin Company to findings of Referee.
10. Exceptions of Ketcham & Rothschild to findings of Referee.
11. Petition of Robert W. Irwin Company for review of Referee's order.
12. Petition of Ketcham & Rothschild for review of Referee's order.
13. Stipulation filed August 8, 1929, for hearing before Referee Ben L. Moore.
14. Stipulation filed January 8. 1929, for taking deposition of Robert W. Irwin, witness on behalf of Robert W. Irwin Company.

15. Stipulation filed December 5, 1928, to preserve rights of petitioners Robert W. Irwin Company and Ketcham & Rothschild, Inc., in merchandise and accounts receivable and proceeds thereof.
16. Referee's order based on said stipulation filed December 5, 1928.
17. Deposition of Robert W. Irwin together with exhibits thereto attached marked 1 to 56, inclusive.
18. Transcript of testimony taken at the hearing.
19. Exhibits introduced at hearing as follows: Petitioner's Exhibit 1 to 23, inclusive, 25 to 32, inclusive, 34 to 56, inclusive (Petitioner's Exhibit 55 is the above-mentioned deposition of Robert W. Irwin; Petitioner's Exhibit 56 is the stipulation preserving the rights of petitioners to merchandise and receivables, which said paper is hereinabove listed as No. 15.) [81] Trustee's Exhibit "A" to "Q" inclusive.
20. Referee's Memorandum Decision dated April 23, 1930.

Dated at Seattle, in said District, this 31st day of December, 1930.

Respectfully submitted,
BEN L. MOORE,
Referee in Bankruptcy. [82]

[Title of Court and Cause.]

PETITION FOR RECLAMATION OF ROBERT W. IRWIN COMPANY.

The petition of Robert W. Irwin Company, a corporation, respectfully shows and alleges:

I.

That your petitioner is now, and was at all times hereinafter mentioned, a corporation organized and existing under and by virtue of the laws of the State of Michigan, with its principal place of business in Grand Rapids in said State, and engaged in the designing and manufacture of furniture.

II.

That at all times hereinafter mentioned, the above-named bankrupt, Renfro-Wadenstein, a corporation was engaged in business in the City of Seattle, King County, Washington, as a retailer of furniture.

III.

That heretofore and on, to wit, the 1st day of April, 1928, petitioner and Renfro-Wadenstein, a corporation, the above-named bankrupt, made and entered into a consignment agreement, a copy of which is hereto attached, marked Petitioner's Exhibit No. 1 and by this reference incorporated herein the same as if set forth herein in full.

IV.

That heretofore and on, to wit, the 6th day of August, 1928, Renfro-Wadenstein, a corporation,

the above-named [83] bankrupt, for a valuable consideration and for the purpose of carrying out the terms and provisions of Paragraph 9 of the consignment agreement heretofore referred to as Petitioner's Exhibit No. 1, sold to petitioner certain furniture and merchandise, at the same time executing and delivering to petitioner a bill of sale therefor, a copy of which bill of sale is hereto attached, marked Petitioner's Exhibit No. 2, and by this reference incorporated herein the same as if set forth in full.

V.

That subsequent to the execution of said consignment agreement, heretofore referred to as Petitioner's Exhibit No. 1, and pursuant to the terms thereof, petitioner shipped to the above-named bankrupt on consignment and for the purpose set forth in and contemplated by said consignment agreement, certain merchandise and furniture, a list of which is attached hereto and marked Petitioner's Exhibit No. 3, and by this reference incorporated herein the same as if set forth herein in full.

VI.

That heretofore and on, to wit, the 3d day of October, 1928, the said Renfro-Wadenstein, a corporation, being then in a failing condition, its affairs, business and assets were taken over by one S. T. Hills as assignee for the benefit of the creditors of the said Renfro-Wadenstein, a corporation, under a common-law assignment, and that the said S. T. Hills, as said assignee, has since said date

continued to and does now assume to act for the above-named bankrupt, having charge of the assets and properties thereof, and in addition thereto the properties of the petitioner hereinabove referred to. [84]

VII.

That heretofore and on, to wit, the 22d day of October, 1928, your petitioner caused to be served upon the said Renfro-Wadenstein, a corporation, bankrupt above named, and S. T. Hills, as assignee, a notice advising them of the termination and cancellation of the consignment agreement, heretofore referred to as Petitioner's Exhibit No. 1, as provided for by the terms of paragraph 10 of said agreement, at the same time making demand upon the said S. T. Hills, as said assignee, and upon the said Renfro-Wadenstein, a corporation, for the return to petitioner of all goods and furniture shipped to the said Renfro-Wadenstein, a corporation, under said agreement, together with all goods and furniture sold and conveyed by the said Renfro-Wadenstein, a corporation, to petitioner by virtue of said bill of sale heretofore referred to as Petitioner's Exhibit No. 2, and for the return to petitioner of accounts representing consigned goods heretofore sold by the said Renfro-Wadenstein, a corporation, for which remittance to petitioner had not been made, as provided for by the terms of paragraph 10 of Petitioner's Exhibit No. 1, and that the said S. T. Hills, as said assignee, and the said Renfro-Wadenstein, a corporation,

have failed and neglected to comply in any manner with the terms of said notice and demand.

VIII.

That all and singular the furniture and merchandise contained and set forth in Petitioner's Exhibits Nos. 2 and 3 are now, and have at all times been, the property of petitioner and that petitioner is now, and has at all times been, entitled to the immediate possession thereof, and that all of said furniture and merchandise is now, [85] with the exception of certain pieces of furniture contained in Petitioner's Exhibits Nos. 2 and 3 which have been sold by the said Renfro-Wadenstein, a corporation, or the said S. T. Hills, as assignee, and the description of which is not at this time known to petitioner, in the hands and possession of the above-named bankrupt, Renfro-Wadenstein, a corporation, and S. T. Hills, as said assignee, and that the petitioner is the owner and entitled to the immediate possession of all accounts receivable representing furniture and merchandise owned by petitioner and sold by the said Renfro-Wadenstein, a corporation, and/or the said S. T. Hills, as assignee, the number of which sales and the description of the furniture and merchandise so sold being, as previously alleged by petitioner, unknown to it, and that the petitioner is the owner and entitled to the immediate possession of the moneys collected by the said Renfro-Wadenstein, a corporation, and the said S. T. Hills, as assignee, as the purchase price on petitioner's goods so sold by them and not remitted to petitioner, said moneys now being in

the hands of the said Renfro-Wadenstein, a corporation, bankrupt above named, or the said S. T. Hills, as assignee, and readily traceable and distinguishable as being the proceeds of the sale of petitioner's said furniture.

WHEREFORE, your petitioner respectfully prays:

1. For the return to it in kind of so much of its furniture and merchandise, more particularly described in Petitioner's Exhibits Nos. 2 and 3, as is now remaining in the hands of the said Renfro-Wadenstein, a corporation, bankrupt above named, and/or the said S. T. Hills, as assignee. [86]

2. For the return to it of any and all accounts receivable, representing any of the merchandise and furniture listed in Petitioner's Exhibits Nos. 2 and 3, which has been sold by the said Renfro-Wadenstein, a corporation, or the said S. T. Hills, as assignee.

3. For the return to it of those moneys now in the hands of the said Renfro-Wadenstein, a corporation, or the said S. T. Hills, as assignee, representing the proceeds of the sale of any of the goods and merchandise described in Petitioner's Exhibits Nos. 2 and 3 for which no accounting has been made to petitioner.

4. For such other and further relief as may be just in the premises.

POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Petitioner.

United States of America,
Western District of Washington,
Northern Division,—ss.

DeWolfe Emory, being first duly sworn, on oath, deposes and says:

That he is one of the attorneys for Robert W. Irwin Company, a corporation, petitioner herein; that he makes this verification for and on behalf of said petitioner for the reason that none of the officers or agents of said petitioner are now within, or reside within, King County, Washington; that he has read the above and foregoing petition for reclamation, knows the contents thereof and believes the same to be true.

DeWOLFE EMORY.

Subscribed and sworn to before me, this 17th day of November, 1928.

[Seal] JUDSON F. FALKNOR,
Notary Public in and for the State of Washington,
Residing at Seattle. [87]

PETITIONER'S EXHIBIT No. 1.

MEMORANDUM OF AGREEMENT made in Duplicate this first day of April, 1928, between ROBERT W. IRWIN COMPANY of Grand Rapids, Michigan, as party of the first part, and Renfro-Wadenstein, a Corporation of Seattle, Washington, as party of the second part, WITNESSETH as follows:

1. Party of the first part agrees that it will from time to time ship goods on consignment to said party of the second part at its place of business in Seattle, consisting of such articles manufactured or handled by party of the first part as party of the second part shall from time to time order, whether from its "Phoenix" or "Royal" lines. All such goods shall be shipped f. o. b. Grand Rapids, Michigan, and shall be invoiced to party of the second part and shall be charged provisionally to the consigned account of said party of the second part. The maximum amount of goods to be at any time shipped on consignment hereunder shall be such as shall be satisfactory to said party of the first part.
2. Party of the second part shall accept delivery of all goods so shipped on its order and shall pay all freight and carriage charges immediately upon arrival, and shall promptly insure said goods in the name of said party of the first part against damage by fire or water to the full insurable value thereof, and shall care for said goods pending sale thereof for party of the first part, but at the expense of said party of the second part. Said party of the second part shall hold said goods exclusively for the purpose of resale for the account of said party of the first part at prices not less than the net invoice price.

3. Party of the second part shall be entitled to retain, by way of commission on sales made, the surplus obtained and collected by it on the sale of specific items over and above the invoice price thereof, after such invoice price has been collected and remitted to first party.
4. Party of the second part shall keep an itemized record of all sales of such consigned goods separate and distinct from its other sales and shall deliver to party of the first part, promptly upon the first and fifteenth of each month, a full copy thereof showing all sales of consigned goods made during the preceding one-half month, including the items sold, the selling price, terms, and name and address of the purchaser in each case, and all collections made on such sales.
5. It shall be the duty of the party of the second part to remit all monies collected by party of the second part from each purchaser until the amount due the first party thereon has been paid in full; such remittance to be on the Twentieth of each month for goods sold during the preceding month. In case party of the second part, due to its not having received from its customer payment for goods sold, shall not be able to make payment in [88] cash, it shall give the party of the first part a demand note collateraled by the assignment of accounts receivable at least equal to the amount of payment due for merchandise sold.

Party of the second part does hereby guarantee the credit of all customers and purchasers and the collection of all accounts created on the sale of such goods.

6. Party of the second part shall pay to party of the first part a carrying charge equal to seven percent for the time after ninety days from date of shipment that merchandise remains in second party's possession unsold. Settlements for this carrying charge shall be made on the first day of January and July of each year.
7. Neither the invoicing of said consigned goods to the party of the second part nor the charging of the same to it on the books of said party of the first part, nor the handling of such transactions, whether for convenience or otherwise, in any manner or form inconsistent herewith shall be deemed to change or discontinue this agreement or prevent said consigned goods from being held, handled and remitted for under and according to the terms hereof.
8. In case any of said goods shall at any time be recalled by said party of the first part, the said party of the second part shall crate and place on cars at Seattle.
9. Said party of the second part now has in its possession certain goods, as per attached list, which have heretofore been sold and delivered to it by said party of the first part on credit, and which have not been paid

for, and it is hereby agreed that the title to said goods, and the same is hereby transferred and conveyed back to said party of the first part, and that from and after this date the same shall be treated as having been delivered to said party of the second part on consignment and under and subject to all of the terms and conditions of this contract. In consideration of the transfer and conveyance of the title to said goods back to said party of the first part, that company does hereby cancel the indebtedness of said party of the second part for said goods.

10. This contract shall continue in force and effect until terminated by one or both of the parties hereto by written notice given to the other, but in case of such termination party of the first part shall have the right at its option to require party of the second part to keep and pay for the consigned goods then remaining on hand at the invoiced price thereof, party of the second part to be entitled to the following terms:

Twenty-five (25%) per cent thereof every Thirty (30) days until fully paid.

The consigned goods or the accounts representing the same and the proceeds thereof shall continue to belong to and be the property of said party of the first part until remittance therefor shall have been made to

and received by said party of the first part as herein provided. [89]

In the event that party of the first part shall not elect to sell said goods to party of the second part, then upon termination of the contract it shall be the duty of party of the second part to crate and place on cars at Seattle, unless otherwise directed by party of the first part.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed by their duly authorized officers the day and year above written.

ROBERT W. IRWIN COMPANY.
By ROBERT W. IRWIN, Prest.
RENFRO–WADENSTEIN.
By O. A. WADENSTEIN,
President. [90]

PETITIONER'S EXHIBIT No. 2.

KNOW ALL MEN BY THESE PRESENTS:

That, Renfro-Wadenstein, of Seattle, Wash., County of King, State of Washington, the party of the first part, for and in consideration of the sum of Fourteen Thousand four hundred ninety 35/100 ($14,490.35) Dollars lawful money of the United States of America, to them in hand by Robert W. Irwin Company of Grand Rapids, Mich., the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and deliver unto the said party of the second part, the following described personal property now

located at 1424 Fifth Ave., Seattle, Wash., in the City of Seattle in the County of King and State of Washington, to-wit:

1	1359	Table		45.00
1	1329	Table		75.00
1	1339	Nest of Tables		68.00
1	1349	Nest of Tables		72.00
1	1336	Nest of Tables		85.00
1	1366	Table		45.00
1	1330	Nest of Tables		145.00
1	1242	Table		80.00
1	1314	Table		76.00
1	1326	Table		165.00
1	1338	Table		425.00
1	9075	Sideboard	200.00	
1	9076	Server	140.00	
1	9077	Cabinet	200.00	
1	9078	Table	218.00	
5	9079	Side chairs at 50.00..	250.00	
1	9079½	Arm chair	67.00	
		Cover	77.00	1152.00
2	5020½	Beds 500.00	1000.00	
1	5021	Dresser	625.00	
1	5022	Chest	505.00	
1	5023	Night Stand	95.00	
1	5024	Dress. Table	615.00	
1	5027	Chair	80.00	
1	5028	Bench	80.00	
		Cover	46.50	3046.50
1	9020	Sideboard	288.00	

1	9021	Server	140.00	
1	9022	Cabinet	180.00	
1	9023	Table	225.00	
5	9024	Side Chairs at 48.00 .	240.00	
1	9024½	Arm chair	56.00	
		Cover	107.50	
			1236.50	
		Less 50.00 Lacq. All.	50.00	1186.50

[91]

1	1303	Table		29.00
1	172¼	Bookcase		46.00
1	490	Desk		67.00
1	514½	Desk		510.00
1	9	Screen		120.00
2	4750½	Beds 150.00	300.00	
1	4751	Dresser	265.00	
1	4752	Chest	250.00	
1	4753	Night Stand	40.00	
1	4754	Vanity	235.00	
1	4757	Chair	35.00	
1	4758	Bench	30.00	
			1155.00	
		Less 25%	288.75	
			866.25	
		Cover	12.75	879.00
2	4980½	Beds 315.00	630.00	
1	4981	Dresser	390.00	
1	4982	Chest	325.00	

1	4983	Night Table	85.00	
1	4984	Vanity	475.00	
1	4987	Chair	70.00	
1	4988	Bench	80.00	
		Cover	12.95	2067.95
1	498	Desk		65.00
1	508	Desk		125.00
1	1313	Drop Leaf Table		64.00
1	1317	Table		47.00
1	1308	Table		69.00
1	9010	Sideboard	235.00	
1	9011	Server	195.00	
1	9012	Cabinet	250.00	
1	9013	Table	250.00	
5	9014	Side Chairs 35.00 ...	175.00	
1	9014½	Arm Chair	47.00	
		Cover	139.00	1291.00
1	1198	Tilt Top Table		44.00
1	1270	Nest of Tables		66.00
1	1278	Tilt Top Table		65.00
1	1290	Table		20.00
1	1302	End Table		28.00
1	1254	Table		44.00
1	507	Desk		145.00
1	494	Desk		110.00
1	8975	Sideboard	420.00	
1	8976	Server	260.00	
1	8977	Cabinet	365.00	
1	8978	Table	415.00	

5	8979	Side Chairs 70.00	350.00	
1	8979½	Arm Chair	90.00	
		Cover	22.50	1922.50
				$14,490.45

[92]

To Have and to Hold the same to the said party of the second part, its heirs, executors, administrators, and assigns forever: And said party of the first part, for their heirs, executors, administrators, covenant and agree to and with the said party of the second part, its executors, administrators and assigns, that said party of the first part is the owner of the said property, goods and chattels and has good right and full authority to sell the same, and that they will warrant and defend the sale hereby made unto the said party of the second part, its executors, administrators and assigns, against all and every person or persons, whomsoever, lawfully claiming or to claim the same,

IN WITNESS WHEREOF the said party of the first part has hereunto set its hand and seal the 6th day of August, 1928.

RENFRO-WADENSTEIN,
By O. A. WADENSTEIN,
President.
By R. R. RENFRO,
Secretary.

Signed and delivered in the presence of
MYRTLE WHALEY. [93]

PETITIONER'S EXHIBIT No. 3.

RENFRO-WADENSTEIN CO., SEATTLE, WASH.

PHOENIX DIVISION.

September 24, 1928.

Apr. 3, 1928	2	3420½	Beds Mhy. & Gum 39.00		78.00
	1	3421	Dresser		63.00
	1	3422	Chiffonier		52.00
	1	3423	Night Stand		14.00
	1	3424	Toilet Table		56.00
	1	3427	Chair		13.00
	1	3428	Bench		13.00
			Cover		2.75
	1	5690	Sideboard Aged Oak 112.00		
	1	5691	Server		65.00
	1	5692	Cabinet		84.00

Apr. 3, 1928	1	5693	Table		80.00
	5	5694	S. Chairs	17.00	85.00
	1	5694½	A. Chair		24.00
			Cover		14.00
	1	5720	Sideboard Wal. & Gum		64.00
	1	5721	Server		33.00
	1	5722	Cabinet		49.00
	1	5723	Table		54.00
	5	5724	S. Chairs	11.00	55.00
	1	5724½	A. Chair		15.00
			Cover		10.50
	1	5730	Sideboard P. V. & Maple		83.00
	1	5731	Server		50.00
	1	5732	Cabinet		68.00
	1	5733	Table		72.00
	5	5734	S. Chairs	17.00	85.00
	1	5734½	A. Chair		22.00
			Cover		20.00

Apr. 4, 1928	1	5680	Sideboard Wal. & Maple		180.00
	1	5681	Server		110.00
	1	5682	Cabinet		150.00
	1	5683	Table		135.00
	5	5684	S. Chairs	32.00	160.00
	1	5684½	A. Chair		40.00
			Cover		48.00
Apr. 6, 1928	2	3510½	Beds Wal. & Gum	60.00	120.00
	1	3511	Dresser		105.00
	1	3512	Chest		81.00
	1	3513	Stand		24.00
	1	3514	T. Table		70.00
	1	3517	Chair		18.00
	1	3518	Bench		17.00
			Cover		7.00
Apr. 11, 1928	1	5600	Sideboard Wal.		335.00
	1	5601	Server		170.00
	1	5602	Cabinet		325.00

	Apr. 11, 1928	1	5603	Table		310.00	
		5	5604	S. Chairs	58.00	290.00	
		1	5604½	A. Chair		70.00	
				Cover		110.00	
[94]							
	May 22, 1928	2	3470½	Beds R. W. & Maple	102.00	204.00	
		1	3471	Dresser		156.00	
		1	3472	Chiffonier		144.00	
		1	3473	Night Stand		40.00	
		1	3474	T. Table		152.00	
		1	3477	Chair		44.00	
		1	3478	Bench		37.00	
				Cover		45.00	
	July 30,	1	3423	Stand Mhy. & Maple		14.00	5148.25
	Apr. 13	1	1367	Table		275.00	
		1	1374	Table		35.00	
		1	1354	Coffee Table		50.00	

Apr. 13	1	1316	Coffee Table	60.00	
	1	1324	Coffee Table	52.00	
	1	1340	Bench	58.00	
	1	1362	A. Chair	98.50	
	1	510	Desk	85.00	
	1	1336	Table	85.00	
	1	516–2	Secretary	250.00	
	1	1369	Table	275.00	
	1	1360	End Table	26.00	
	1	1370	Coffee Table	36.00	
	1	1366	Table	45.00	
	1	1267	Table	42.00	
	1	1287	Nest of Tables	62.00	
	1	1337	End Table	35.00	1569.50
Apr. 13	2	5210½	Beds Mhy. 82.00	164.00	
	1	5211	Dresser	130.00	
	1	5212	Chest	110.00	

Apr. 13	1	5213	Night Stand 20.00		
	1	5214	Dressing Table 85.00		
	1	5217	Chair 19.00		
	1	5218	Bench 19.00		
			Cover 3.25		550.25
Apr. 13	2	5000½	Beds Mhy. 92.00	184.00	
	1	5001	Dresser 145.00		
	1	5002	Chest 115.00		
	1	5003	Night Stand 27.00		
	1	5004	Dressing Table 115.00		
	1	5007	Chair 25.00		
	1	5008	Bench 20.00		
			Cover 5.25		
	2	5200½	Beds Mhy. & S. W. 110.00	220.00	
	1	5201	Dresser 145.00		
	1	5202	Chest 125.00		
	1	5203	Night Stand 30.00		

Apr. 13	1	5204	Dressing Table	135.00	
	1	5207	Chair	25.00	
	1	5208	Bench	30.00	
			Cover	19.25	1365.50
Apr. 13, 1928	1	9115	Sideboard	230.00	
	1	9116	Server	142.00	
	1	9117	Cabinet	210.00	
	1	9118	Table	235.00	
	5	9119	S. Chairs 58.00	290.00	
	1	9119½	A. Chair	73.00	
			Cover	21.00	
	1	9135	Sideboard	125.00	
	1	9136	Server	85.00	
[95]					
	1	9137	Cabinet	110.00	
	1	9138	Table	120.00	
	5	9139	S. Chairs 25.00	125.00	

Apr. 13, 1928	1	9139½	A. Chair		30.00
			Cover		15.00
	1	9125	Sideboard		140.00
	1	9126	Server		88.00
	1	9127	Cabinet		125.00
	1	9128	Table		119.00
	5	9129	S. Chairs	28.00	140.00
	1	9129½	A. Chair		38.00
			Cover		40.00
	1	9050	Sideboard		218.00
	1	9051	Server		117.00
	1	9052	Cabinet		165.00
	1	9053	Table		148.00
	5	9054	S. Chairs	32.00	160.00
	1	9054½	A. Chair		42.00
			Cover and Nails		42.00

Apr. 13, 1928	1	9120	Sideboard	225.00	
	1	9121	Server	175.00	
	1	9122	Cabinet	225.00	
	1	9123	Table	200.00	
	5	9124	S. Chairs 52.00	260.00	
	1	9124½	A. Chair	65.00	
			Cover	49.00	4582.50
Apr. 4	1	1355	A. Chair	67.00	
	1	1356	A. Chair	77.00	144.00
May 25	1	1222	Nest of Tables	76.00	
	2	5100½	Beds 125.00	250.00	
	1	5101	Dresser	215.00	
	1	5102	Chest	170.00	
	1	5103	Night Stand	40.00	

May 25	1	5104	Dressing Table	185.00	
	1	5107	Chair	45.00	
	1	5108	Bench	45.00	
	1		Cover	10.50	1036.50
May 29,	1	1348	Console	225.00	
	1	1348½	Mirror 130.00	355.00	
Aug. 8,	1	1350	Lift Lid Table	85.00	
	1	1361	Coffee Table	33.00	118.00
Aug. 20,	1	515–2	Secretary	185.00	185.00
					15,054.50

[Endorsed]: Filed this 17 day of Nov. 1928, at 10 o'clock A. M. C. R. Hawkins, Referee [96]

[Title of Court and Cause.]

ANSWER OF TRUSTEE TO PETITION OF RECLAMATION OF ROBERT W. IRWIN COMPANY.

Comes now W. S. Osborn, the duly appointed, acting and qualified Trustee of the estate of the above-named bankrupt, having succeeded and superceded S. T. Hills as assignee, and, for answer to the petition for reclamation of Robert W. Irwin Company, alleges:

I.

Answering Paragraphs I and II, the Trustee admits the same.

II.

Answering Paragraph III, the Trustee denies the same.

III.

Answering Paragraph IV, the Trustee denies that the alleged agreements were executed for any consideration or were effective for any purpose.

IV.

Answering Paragraph V, the Trustee denies the same.

V.

Answering Paragraph VI, Trustee alleges that the said Hills as assignee was superseded in the charge of the assets and properties of the bankrupt on November 15, 1928, by John L. McLean, Receiver, who in turn was superceded by answering Trustee and the Trustee denies each and every other allegation.

VI.

Answering Paragraph VII, Trustee denies the same.

VII.

Answering Paragraph VIII, the Trustee denies each and every allegation therein. [97]

For further answer and by way of a further and separate defense thereto, Trustee alleges:

I.

That the bankrupt, Renfro-Wadenstein, at all times referred to in the petition and in this answer, *have* been a corporation organized under the laws of the State of Washington. That the alleged consignment agreement described as Petitioner's Exhibit 1 and the alleged bill of sale described as Exhibit 2, conceding the same to have been entered into between the parties therein named, as alleged in the petition, are each of them fraudulent and void as to this Trustee and title to the property, assets and the proceeds therefrom claimed by the petitioner and referred to in said petition and the exhibits attached thereto passed to the Trustee notwithstanding for the following reasons:

(1) Neither the alleged consignment agreement (Exhibit No. 1) nor the alleged bill of sale (Exhibit No. 2) were recorded in the office of the Auditor of King County, Washington, in which the property was situated, within ten days after such alleged sale had been made, as required by Section 5827, Remington's Compiled Statutes.

(2) Said alleged sale was a mere pretense and disguise of the real transaction, which transaction was in fact an attempt between the parties to give the petitioner security on the merchandise described in said bill of sale for an antecedent indebtedness owing the petitioner from the bankrupt for the purchase price of said merchandise. That although a bill of sale in form, Exhibit 2 was in truth and in law a chattel mortgage and therefore fraudulent and void as against this Trustee because it was not executed and filed in the office of the County Auditor of King County wherein the mortgaged property was situated, as required by Sections 3780–3781–3782, Remington's Compiled Statutes. [98]

(3) That at the time of the execution of said instrument and at all times thereafter, Renfro-Wadenstain, vendor therein, was insolvent, both within the provisions of the Bankruptcy Act and within the Washington State rule of insolvency, with the full knowledge of petitioner, and the purpose and effect thereof was to create a preference in favor of the said petitioner and the same and each of them are therefore invalid as to this Trustee.

(4) The alleged consignment agreement was a mere masquerade in writing under which it was intended in fact between the parties that petitioner should sell and deliver merchandise to the bankrupt and retain a lien thereon so as to secure the price without making a public record of the transaction and the bankrupt and petitioner endeavored thereby under the pretense of a consignment that the bankrupt should buy and pay for all of said

merchandise, but that if the purchaser became insolvent or bankrupt a claim might be advanced that the transaction entitled the petitioner to a lien thereon or the retention of title thereto.

(5) That both by the face of said contracts and by the conduct of the parties thereunder the transaction was in fact a sale with clauses therein attempting to constitute the same conditional sale and therefore a fraud upon the creditors of the vendee therein named, and as a conditional sale the same is invalid as to this Trustee because it was not executed and filed in the Auditor's office of King County, State of Washington, in the manner and within the time required by Sections 3790–3791 of Remington's Compiled Statutes, State of Washington.

WHEREFORE, having fully answered, the Trustee demands judgment dismissing the petition of the claimant herein with costs. [99]

LEOPOLD M. STERN,
BAUSMAN, OLDHAM & EGGERMAN,
Attorneys for Trustee.

Office and P. O. Address:
1408–1413 Hoge Bldg.,
Seattle, Washington,
King County.

State of Washington,
County of King,—ss.

W. S. Osborn, being first duly sworn, on his oath deposes and says: That he is the Trustee above named; that he has read the foregoing answer,

knows the contents thereof, and believes the same to be true.

W. S. OSBORNE.

Subscribed and sworn to before me this 5 day of December, 1928.

LOUISE J. LYON,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed this 9 day of Jan., 1929, at 2 o'clock P. M. [100]

[Title of Court and Cause.]

REPLY OF ROBERT W. IRWIN COMPANY TO ANSWER OF TRUSTEE.

Comes now Robert W. Irwin Company, a corproation, petitioner herein, and replying to the affirmative matter contained in the answer of the Trustee to the petition of reclamation of Robert W. Irwin Company, admits and denies as follows:

I.

Admits that the bankrupt, Renfro-Wadenstein, at all times referred to in the petition and in said Trustee's answer was a corporation organized under the laws of the State of Washington, but denies

wach and every other allegation in said further answer and further and separate defense contained.

POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Robert W. Irwin Company, a Corporation, Petitioner.
Office & P. O. Address:
977 Dexter Horton Bldg.,
Seattle, Washington.

United States of America,
Western District of Washington,
Northern Division,—ss.

DeWolfe Emory, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for Robert W. Irwin Company, the petitioner herein, and as such makes this verification for and on behalf of said petitioning corporation for the reason that none of the officers of said corporation are within the District and Division aforesaid; that he has read the foregoing reply, knows the contents thereof, and believes the same to be true.

DeWOLFE EMORY.

Subscribed and sworn to before me this 15 day of December, 1928.

[Notarial Seal] JUDSON F. FALKNOR,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed this 19 day of Dec., 1928, at 2 o'clock P. M. [101]

[Title of Court and Cause.]

PETITION FOR RECLAMATION OF KETCHAM & ROTHSCHILD, INC.

To the District Court of the United States for the Western District of Washington, Northern Division:

The petition of Ketcham & Rothschild, Inc., a corporation, respectfully shows and alleges:

I.

That your petitioner is now and was at all times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in Chicago in said state and engaged in the designing and manufacture of furniture.

II.

That at all times hereinafter mentioned the above-named bankrupt, Renfro-Wadenstein, a corporation, was engaged in business in the city of Seattle, King County, Washington, as a retailer of furniture.

III.

That heretofore and on, to wit, the 30th day of March, 1928, petitioner and Renfro-Wadenstein, a corporation, the above-named bankrupt, made and entered into a consignment agreement, a copy of which is hereto annexed, marked Petitioner's Exhibit No. 1, and by reference incorporated herein the same as if set forth herein in full.

IV.

That heretofore and on, to wit, the 16th day of [102] April, 1928, Renfro-Wadenstein, a corporation, the above-named bankrupt, for valuable consideration and for the purpose of carrying out the terms and provisions of Paragraph 9 of the consignment agreement, heretofore referred to as Petitioner's Exhibit No. 1, sold to petitioner certain furniture and merchandise, at the same time executing and delivering to petitioner a bill of sale therefor, which bill of sale was thereafter and on, to wit, the 24th day of April, 1928, filed for record in the office of the Auditor at Seattle, King County, Washington, a copy of which bill of sale is hereto attached marked Petitioner's Exhibit No. 2, and by this reference incorporated herein the same as if set forth herein in full.

V.

That subsequent to the execution of said consignment agreement, heretofore referred to as Petitioner's Exhibit No. 1, and pursuant to the terms thereof, petitioner shipped to the above-named bankrupt on consignment and for the purpose set forth in and contemplated by said consignment agreement, certain merchandise and furniture, a list of which is attached hereto and marked Petitioner's Exhibit No. 3, and by this reference incorporated herein the same as if set forth herein in full, said Petitioner's Exhibt No. 3 including not only the furniture and merchandise so shipped by petitioner to said bankrupt pursuant to the terms and provisions of Petitioner's Exhibit No. 1, but also in-

cluding the furniture and merchandise sold by said bankrupt to petitioner under and by virtue of the bill of sale, heretofore referred to as Petitioner's Exhibit No. 2, as contemplated by the provisions of Paragraph 9 of Petitioner's Exhibit No. 1. [103]

VI.

That heretofore and on, to wit, the 3d day of October, 1928, the said Renfro-Wadenstein, a corporation, being then in a failing condition, its affairs, business and assets were taken over by one S. T. Hills as assignee for the benefit of the creditors of the said Renfro-Wadenstein, a corporation, under a common-law assignment, and that the said S. T. Hills, as said assignee, has since said date continued to and does now assume to act for the above-named bankrupt, having charge of the assets and properties thereof, and in addition thereto the properties of the petitioner hereinabove referred to.

VII.

That heretofore and on, to wit, the 22d day of October , 1928, your petitioner caused to be served upon the said Renfro-Wadenstein, a corporation, bankrupt above named, and S. T. Hills, as assignee, a notice advising them of the termination and cancellation of the consignment agreement, heretofore referred to as Petitioner's Exhibit No. 1, as provided for by the terms of Paragraph 10 of said agreement, at the same time making demand upon the said S. T. Hills, as said assignee, and upon the said Renfro-Wadenstein, a corporation, for the return to petitioner of all goods and furniture shipped

to the said Renfro-Wadenstein, a corporation, under said agreement, together with all goods and furniture sold and conveyed by the said Renfro-Wadenstein, a corporation, to petitioner by virtue of said bill of sale, heretofore referred to as Petitioner's Exhibit No. 2, and for the return to petitioner of accounts representing consigned goods heretofore sold by the said Renfro-Wadenstein, a corporation, for which remittance to petitioner had not been made, as provided for by the terms of Paragraph 10 of [104] Petitioner's Exhibit No. 1, and that the said S. T. Hills, as said assignee, and the said Renfro-Wadenstein, a corporation, have failed and neglected to comply in any manner with the terms of said notice and demand.

VIII.

That all and singular the furniture and merchandise contained and set forth in Petitioner's Exhibit No. 3 is now and has at all times been the property of petitioner and that petitioner is now and has at all times been entitled to the immediate possession thereof and that all of said furniture and merchandise is now, with the exception of certain pieces of furniture contained in Petitioner's Exhibit No. 3 which have been sold by the said Renfro-Wadenstein, a corporation, or the said S. T. Hills, as assignee, and the description of which is not at this time known to the petitioner, in the hands and possession of the above-named bankrupt, Renfro-Wadenstein, a corporation, and S. T. Hills, as said assignee, and that the petitioner is the owner and entitled to the immediate possession of all accounts receivable, representing furniture and merchandise

owned by petitioner and sold by the said Renfro-Wadenstein, a corporation, and/or the said S. T. Hills, as assignee, the number of which said sales and the description of the furniture and merchandise so sold being, as previously alleged by petitioner, unknown to it, and that the petitioner is the owner and entitled to the immediate possession of moneys collected by the said Renfro-Wadenstein, a corporation, and the said S. T. Hills, as said assignee, as the purchase price on petitioner's goods so sold by them and not remitted to petitioner, said moneys now being in the hands of the said Renfro-Wadenstein, a corporation, bankrupt above named, or the said S. T. Hills, as assignee, [105] and readily traceable and distinguishable as being the proceeds of the sale of petitioner's said furniture.

WHEREFORE, your petitioner respectfully prays:

1. For the return to it in kind of so much of its furniture and merchandise, more particularly described in Petitioner's Exhibit No. 3, as is now remaining in the hands of the said Renfro-Wadenstein, a corporation, bankrupt above named, and/or the said S. T. Hills as assignee.

2. For the return to it of any and all accounts receivable, representing any of the merchandise and furniture listed in Petitioner's Exhibit No. 3, which has been sold by either the said Renfro-Wadenstein, a corporation, or the said S. T. Hills, as assignee.

3. For the return to it of those moneys now in the hands of the said Renfro-Wadenstein, a corpo-

ration, and/or the said S. T. Hills, as assignee, representing the proceeds of the sale of any of the goods and merchandise described in Petitioner's Exhibit No. 3, for which no accounting has been made to petitioner.

4. For such other and further relief as may be just in the premises.

POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Petitioner. [106]

United States of America,
Western District of Washington,
Northern Division,—ss.

DeWolfe Emory, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for Ketcham & Rothschild, Inc., a corporation, petitioner herein; that he makes this verification for and on behalf of said petitioner for the reason that none of the officers or agents of said petitioner are now within, or reside within, King County, Washington; that he has read the above and foregoing petition for reclamation, knows the contents thereof and believes the same to be true.

DeWOLFE EMORY.

Subscribed and sworn to before me this 17 day of November, 1928.

[Seal] JUDSON F. FALKNOR,
Notary Public in and for the State of Washington,
Residing at Seattle. [107]

PETITIONER'S EXHIBIT No. 1.

MEMORANDUM OF AGREEMENT made in duplicate this 30th day of March, 1928, between KETCHAM & ROTHSCHILD, INC., of Chicago, Illinois, as party of the first part, and Renfro-Wadenstein, a corporation of Seattle, Washington, as party of the second part, WITNESSETH, as follows:

1. Party of the first part agrees that it will from time to time ship goods on consignment to said party of the second part at its place of business in Seattle, consisting of such articles manufactured or handled by party of the first part as party of the second part shall from time to time order from the Ketcham & Rothschild line. All such goods shall be shipped f. o. b. Chicago, Illinois, and shall be invoiced to party of the second part and shall be charged provisionally to the consigned account of said party of the second part. The maximum amount of goods to be at any time shipped on consignment hereunder shall be such as shall be satisfactory to said party of the first part.
2. Party of the second part shall accept delivery of all goods so shipped on its order and shall pay all freight and carriage charges immediately upon arrival, and shall promptly insure said goods in the name of said party of the first part against damage by fire, or

water to the full insurable value thereof, and shall care for said goods pending sale thereof for party of the first part, but at the expense of said party of the second part. Said party of the second part shall hold said goods exclusively for the purpose of re-sale for the account of said party of the first part at prices not less than the net invoice price.

3. Party of the second part shall be entitled to retain, by way of commission on sales made, the surplus obtained and collected by it on the sale of specific items over and above the invoice price thereof, after such invoice price has been collected and remitted to first party.
4. Party of the second part shall keep an itemized record of all sales of such consigned goods separate and distinct from its other sales, and shall deliver to party of the first part, promptly upon the first and fifteenth of each month, a full copy thereof showing all sales of consigned goods made during the preceding one-half month, including the items sold, the selling price, terms, and name and address of the purchaser in each case, and all collections made on such sales.
5. It shall be the duty of the party of the second part to remit all monies collected by party of the second part from each purchaser until the amount due the first party thereon has been paid in full; such remittance to be on the Twentieth of each month for [108] goods sold during the preceding month. In

case party of the second part, due to its not having received from its customer payment for goods sold, shall not be able to make payment in cash, it shall give the party of the first part a demand note collateraled by the assignment of accounts receivable at least equal to the amount of payment due for merchandise sold. Party of the second part does hereby guarantee the credit of all customers and purchasers and the collection of all accounts created on the sale of such goods.

6. Party of the second part shall pay to party of the first part a carrying charge equal to seven per cent for the time after ninety days from date of shipment that merchandise remains in second party's possession unsold. Settlements for this carrying charge shall be made on the first day of January and July of each year.
7. Neither the invoicing of said consigned goods to the party of the second part, nor the charging of the same to it on the books of said party of the first part, nor the handling of such transactions, whether for convenience or otherwise, in any manner or form inconsistent herewith shall be deemed to change or discontinue this agreement or prevent said consigned goods from being held, handled and remitted for under and according to the terms hereof.
8. In case any of said goods shall at any time be recalled by said party of the first part, the said party of the second part shall crate and

place on cars at Seattle.

9. Said party of the second part now has in its possession certain goods, as per attached list, which have heretofore been sold and delivered to it by said party of the first part on credit, and which have not been paid for, and it is hereby agreed that the title to said goods, and the same is hereby transferred and conveyed back to said party of the first part, and that from and after this date the same shall be treated as having been delivered to said party of the second part on consignment and under and subject to all of the terms and conditions of this contract. In consideration of the transfer and conveyance of the title to said goods back to said party of the first part, that company does hereby cancel the indebtedness of said party of the second part for said goods.

10. This contract shall continue in force and effect until terminated by one or both of the parties hereto by written notice given to the other, but in case of such termination party of the first part shall have the right, at its option to require party of the second part to keep and pay for the consigned goods then remaining on hand at the invoiced price thereof, party of the second part to be entitled to the following terms:

Twenty-five (25%) per cent thereof every Thirty (30) days until fully paid. [109]

The consigned goods or the accounts representing the same and the proceeds thereof shall con-

tinue to belong to and be the property of said party of the first part until remittance therefor shall have been made to and received by said party of the first part as herein provided.

In the event that party of the first part shall not elect to sell said goods to party of the second part, then upon termination of the contract it shall be the duty of party of the second part to crate and place on cars at Seattle, unless otherwise directed by party of the first part.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed by their duly authorized officers the day and year above written.

KETCHAM & ROTHSCHILD, INC.
By JERRY W. ROTHSCHILD.
RENFRO-WADENSTEIN.
By O. A. WADENSTEIN,
President. [110]

PETITIONER'S EXHIBIT No. 2.

2458169. Volume 81 Miscellaneous. Page 302.
RENFRO-WADENSTEIN,
to
KETCHAM & ROTHSCHILD, INC.,

BILL OF SALE.

KNOW ALL MEN BY THESE PRESENTS:

THAT Renfro-Wadenstein of Seattle, County of King, State of Washington, the party of the first part for and in consideration of the sum of $11,585.25 Dollars lawful money of the United States of America, to them in hand paid by Ketcham and

Rothschild, Inc., of Chicago, Ill., the party of the second part the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and deliver unto the said party of the second part, the following described personal property now located at it's place of business at 1424 5th Ave. in the Seattle, in the County of King, and State of Washington, to-wit:

X

ud. Note
to X
ttached
y rider

1#		Bench	2600	26.00
2#	611	Chairs	117.00	234.00
1#	1986	Arm Chair	186.00	186.00
1#	1986	Sofa	352.50	352.50
1#	2086	Sofa	188.50	188.50
1#	2113	Sofa	300.00	300.00
1#	2114	Chair	175.00	175.00
1#	2168	Chair	154.00	154.00
1#	2170	Wing Chair	180.00	180.00
1#	2173	Chair	266.00	266.00
1#	2175	Chair	268.00	268.00
1#	2176	Chair	247.00	247.00
1#	2182	Chair	185.00	185.00
1#	2189	Sofa	222.00	222.00
1#	2195	Sofa	263.00	263.00
1#	2213	Chair	275.00	275.00
1#	2229	Table	28.00	28.00
1#	2229	Love Seat	44.00	44.00
1#	2231	Love Seat	44.00	44.00
1#	2231	Bench	30.50	30.50
1#	2238	Sofa	383.00	383.00
1#	2238	Chair	208.00	208.00
1#	2249½	Chair	57.00	57.00

2#	2249	Sofa	63.00	127.00
1#	2251	Bench	81.00	81.00
1#	2251	Sofa	315.00	315.00
1#	2251	Arm Chair	158.00	158.00
1#	2256	Divan	142.00	142.00
1#	2260	Coffee Table	57.00	57.00
1#	2264	Chair	86.00	86.00
1#	2265	Chair	85.00	85.00
1#	2282	Foot Rest	16.00	16.00
1#	2287	Chair	120.00	120.00
1#	2310	Sofa	84.00	84.00
1#	2313	Chair	83.50	83.50
1#	2318	Sofa	303.00	303.00
[111]				
1#	2325	Love Seat	89.25	89.25
1#	2332	Sofa	372.00	372.00
1#	2334	Reading Chair	96.00	96.00
1#	2335½	Server	92.00	92.00
4#	2335	Chairs	38.00	152.00
1#	2335	Table	68.00	68.00
1#	2350	Davenport	280.00	280.00
1#	2368½	Chair	125.00	125.00
1#	2376	Sofa	314.00	314.00
1#	2377	Chair	370.00	370.00
1#	2382	Chair	68.00	68.00
1#	2394	Chair	175.00	175.00
1#	2398	Chair	122.00	122.00
1#	2398	Settee	184.50	184.50
1#	2406	Chair	60.00	60.00
2#	2407	Chair	197.50	395.00
2#	2408	Sofas	293.00	586.00
1#	2408	Sofa	229.00	229.00

1#	2411	Couch	205.00	205.00
1#	2411	Sofa	490.00	490.00
1#	2416	Sofa	251.00	251.00
1#	2419	Chair	181.00	181.00
1#	2976	Chair	110.00	110.00
1#	3107	Sofa	248.50	248.50
1#	3141	Chair	168.00	168.00
1#	3165½	Bench	46.00	46.00
1#	2349	Gr. Chair	134.00	134.00

$11,585.25

X

To have and to hold the same to the said party of the second part its heirs, executors, administrators and assigns forever. And said party of the first part for its heirs, executors, administrators, covenant and agree to and with the said party of the first part is owner of the said property, goods and chattels, and has good right and full authority to sell the same, and that they will warrant and defend the sale hereby made unto the said party of the second part, its executors, administrators and assigns, against all and every person or persons whomsoever, lawfully claiming or to claim the same.

IN WITNESS WHEREOF, the said party of the first part has hereunto set its hand and seal the —— day of April, 1928.

(R. W. Corp. Seal.)

RENFRO-WADENSTEIN.

By O. A. WADENSTEIN, Pres. (Seal)

By R. R. RENFRO, Secretary. (Seal)

Signed, and delivered in the presence of

M, WHALEY. [112]

State of Washington,
County of King,—ss.

I, A. E. Barrett, Notary Public in and for the State of Washington, residing at Seattle, do hereby certify that on this 16th day of April, 1928, personally appeared before me O. A. Wadenstein and R. R. Renfro, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes herein mentioned.

Given under my hand and official seal this 16th day of April, 1928.

(E. A. B. Notarial Seal) E. A. BARRETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

(Com. Ex. Dec. 27, 1929.)

Filed for record at request of Poe, Falknor, Falknor & Emory, Apr. 24, 1928, at 25 min. past 9 A. M. George A. Grant, County Auditor. [113]

PETITIONER'S EXHIBIT No. 3.

1	2229	Bench	26.25
1	611	Chaise	117.00
1	1986	Sofa	352.50
1	1986	Arm Chr.	186.00
1	2086	Sofa	188.50
1	2113	Sofa	300.00
1	2114	Chair	175.50
1	2117	Sofa	282.00
1	2126	Sofa	295.50

1	2147	Sofa		334.00
1	2155	C. Chair		80.50
1	2168	Chair		154.50
1	2170	Wing Chair		180.00
1	2175	Sofa		616.00
1	2175	Chair		268.00
1	2176	Chair		247.00
1	2189	Sofa		222.00
1	2195	Sofa		263.50
1	2213	Chair		275.00
1	2219	Chair		148.50
1	2225	Sofa		227.50
1	2229	Table		28.00
1	2229	Love Seat		44.00
1	2231	Love Seat		44.00
1	2231	Bench		30.50
1	2238	Sofa		383.50
1	2238	Chair		208.00
1	2249½	Chair		57.00
2	2249	Sofas	63.50	127.00
1	2251	Bench		81.00
1	2251	Arm Chair		158.00
1	2256	Divan		142.00
1	2260	Coffee Table		57.00
1	2264	Chair		86.00
1	2265	Chair		85.00
1	2282	Foot Stool		16.00
1	2287	Chair		120.00
1	2300	Sofa		304.00
1	2310	Sofa		82.00
1	2313	Chair		83.50
1	2318	Sofa		303.00

1	2325	Love Seat		89.25
1	2328	Open Arm Chair		62.00
1	2332	Sofa		372.00
4	2335	Chairs	38.00	152.00
1	2335	Table		68.00
1	2335½	Server		92.00
1	2346	Sofa		320.00
1	2350	Sofa		280.50
1	2357	Side Chair		48.00
1	2376	Sofa		314.00
		Forward		9,177.00

[114]

		Brought Forward		9,177.00
1	2377	Chair		370.50
1	2382	Chair		68.00
1	2394	Chair		175.00
1	2396	Sofa		525.00
1	2396	Arm Chair		275.00
1	2398	Chair		122.50
1	2398	Settee		184.50
1	2406	Chair		60.00
2	2407	Chairs	197.50	395.00
2	2408	Sofa	293.00	586.00
1	2408	Sofa		229.50
1	2411	Sofa		490.50
1	2416	Sofa		251.50
1	2419	Chair		181.00
1	2428	Sofa		544.00
1	2428	Arm Chair		266.00
1	2428	L. Chair		192.00
1	2429	Sofa		362.50

1	2433	Chair		99.00
1	2436	Chair		158.50
1	2441	Chair		89.50
2	2443	Sofas	242.00	484.00
1	2976	Chair		110.00
1	3107	Sofa		285.00
1	3141	Chair		188.00
1	3141	Chair		168.50
1	3165½	Bench		46.00
				$16,084.00

[Endorsed]: Filed this 17 day of Nov., 1928, at 11 o'clock A. M. C. L. Hawkins, Referee. [115]

[Title of Court and Cause.]

ANSWER OF TRUSTEE TO PETITION FOR RECLAMATION OF KETCHAM & ROTHSCHILD, INC.

Comes now W. S. Osborn, the duly appointed, acting and qualified Trustee of the estate of the above-named bankrupt, having succeeded and superceded S. T. Hills as assignee, and, for answer to the petition for reclamation of Ketcham & Rothschild, Inc., alleges:

I.

Answering Paragraph I and II, the Trustee admits the same.

II.

Answering Paragraph III, the Trustee denies the same.

III.

Answering Paragraph IV, the Trustee denies that the alleged agreements were executed for any consideration or were effective for any purpose.

IV.

Answering Paragraph V, the Trustee denies the same.

V.

Answering Paragraph VI, Trustee alleges that the said Hills as assignee was superceded in the charge of the assets and properties of the bankrupt on November 15, 1928, by John L. McLean, receiver, who in turn was superceded by answering Trustee and the Trustee denies each and every other allegation.

VI.

Answering Paragraphs VII–VIII, the Trustee denies the same. [116]

For further answer and by way of a further and seperate defense thereto, Trustee alleges:

I.

That the bankrupt, Renfro-Wadenstein, at all times referred to in the petition and in this answer, have been a corporation organized under the laws of the State of Washington. That the alleged consignment agreement described as Petitioner's Exhibit 1 and the alleged bill of sale described as Exhibit 2, conceding the same to have been entered into between the parties therein named, as alleged in the petition, are each of them fraudulent and

void as to this trustee and title to the property, assets and the proceeds therefrom claimed by the petitioner and referred to in said petition and the exhibits attached thereto passed to the Trustee notwithstanding for the following reasons:

(1) Neither the alleged consi*h*nment agreement (Exhibit No. 1) nor the alleged bill of sale (Exhibit No. 2) were recorded in the office of the Auditor of King County, Washington, in which the property was situated, within ten days after such alleged sale had been made, as required by Section 5827, Remington's Compiled Statutes.

(2) Said alleged sale was a mere pretense and disguise of the real transaction, which transaction was in fact an attempt between the parties to give the petitioner security on the merchandise described in said bill of sale for an antecedent indebtedness owing the petitioner from the bankrupt for the purchase price of said merchandise. That although a bill of sale in form, Exhibit 2 was in truth and in law a chattel mortgage and therefore fraudulent and vo*u*d as against this Trustee because it was not executed and filed in the office of the County Auditor of King County wherein the mortgaged property was situated, as required by Sections 3780–3781–3782, Remington's Compiled Statutes. [117]

(3) That at the time of the execution of said instrument and at all times thereafter, Renfro-Wadenstein, vendor therein, was insolvent, both within the provisions of the Bankruptcy Act and within the Washington state rule of insolvency,

with the full knowledge of petitioner, and the purpose and effect thereof was to create a preference in favor of the said petitioner and the same and each of them are therefore invalid as to this Trustee.

(4) The alleged consignment agreement was a mere masquerade in writing under which it was intended in fact between the parties that petitioner should sell and deliver merchandise to the bankrupt and retain a lien thereon so as to secure the price without making a public record of the transaction and the bankrupt and petitioner endeavored thereby under the pretense of a consignment that the bankrupt should buy and pay for all of said merchandise, but that if the purchaser became insolvent or bankrupt a claim might be advanced that the transaction entitled the petitioner to a lien thereon or the retention of title thereto.

(5) That both by the face of said contracts and by the conduct of the parties thereunder the transaction was in fact a sale with clauses therein attempting to constitute the same as a conditional sale and therefore a fraud upon the creditors of the vendee therein named, and as a conditional sale the same is invalid as to this Trustee because it was not executed and filed in the Auditor's office of King County, State of Washington, in the manner and within the time required by Sections 3790–3791 of Remington's Compiled Statutes, State of Washington.

WHEREFORE, having fully answered, the Trustee demands judgment dismissing the petition of the claimant herein costs. [118]

LEOPOLD M. STEN,
BAUSMAN, OLDHAM & EGGERMAN,
Attorneys for Trustee.

Office and P. O. Address:
1408–1418 Hoge Bldg.,
Seattle, King County,
Washington.

State of Washington,
County of King,—ss.

W. S. Osborn, being first duly sworn, on his oath deposes and says; That he is the Trustee above named; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

W. S. OSBORN.

Subscribed and sworn to before me this 5 day of December, 1928.

LOUIS J. LYON,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed this 9 day of Jan., 1929, at 2 o'clock P. M. [119]

[Title of Court and Cause.]

REPLY OF KETCHAM & ROTHSCHILD, INC., TO ANSWER OF TRUSTEE.

Comes now Ketcham & Rothschild, Inc., petitioner

herein, and replying to the affirmative matter contained in the answer of the Trustee to the petition of reclamation of Ketcham & Rothschild, Inc., admits and denies as follows:

I.

Admits that the bankrupt, Renfro-Wadenstein, at all times referred to in the petition and in said Trustee's answer was a corporation organized under the laws of the State of Washington, but denies each and every other allegation in said further answer and further and separate defense contained.

POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Ketcham & Rothschild, Inc., Petitioner.
Office & P. O. Address:
977 Dexter Horton Bldg.,
Seattle, Washington.

United States of America,
Western District of Washington,
Northern Division,—ss.

DeWolfe Emory, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for Ketcham & Rothschild, Inc., petitioner herein, and as such makes this verification for and on behalf of said petitioning corporation for the reason that none of the officers of said corporation are within the District and Division aforesaid; that he has read the foregoing reply, knows the contents thereof, and believes the same to be true.

DeWOLFE EMORY. [120]

Subscribed and sworn to before me this 15th day of December, 1928.

[Notarial Seal]

JUDSON F. FALKNOR,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed this 19 day of Dec., 1928, at 2 P. M. o'clock. [121]

[Title of Court and Cause.]

ORDER OF REFEREE DENYING PETITION IN RECLAMATION OF ROBERT W. IRWIN COMPANY.

In re: ROBERT W. IRWIN, Petitioner In Reclamation.

This cause having heretofore come on for trial, the petitioner in reclamation being represented by its attorneys, Poe, Falknor, Falknor & Emory, and the Trustee in Bankruptcy by D. G. Eggerman and Leopold M. Stern, and the respective parties having introduced their evidence, and the matter having been fully argued and the cause taken under advisement, and the undersigned Referee in Bankruptcy having heretofore made and filed his memorandum decision,—

IT IS ORDERED, CONSIDERED AND ADJUDGED: That the bill of sale to petitioner was executed and delivered at a time when the bankrupt was insolvent and constituted a preference and is invalid.

IT IS FURTHER ORDERED that the contract denominated a consignment contract was and is in fact and in law a contract of sale; and

THEREFORE the petition in reclamation of petitioner Robert W. Irwin is denied.

To all of which petitioner excepts and its exception is allowed.

Dated this 2d day of May, 1930.

BEN L. MOORE,
Referee in Bankruptcy.

OK. as to form.

POE, FALKNOR, FALKNOR & EMORY,
For Petitioner.

[Endorsed]: Filed this 2d day of May, 1930, at 4 o'clock P. M. [122]

[Title of Court and Cause.]

ORDER OF REFEREE DENYING PETITION IN RECLAMATION OF ROTHSCHILD & KETCHAM, INCORPORATED.

In re: KETCHAM & ROTHSCHILD, Petitioners in Reclamation.

This cause having heretofore come on for trial, the petitioner in reclamation being represented by its attorneys, Poe, Falknor, Falknor & Emory, and the Trustee in Bankruptcy by D. G. Eggerman and Leopold M. Stern, and the respective parties having introduced their evidence, and the matter having been fully argued and the cause taken under advisement, and the undersigned Referee in Bank-

ruptcy having heretofore made and filed his memorandum decision,—

IT IS ORDERED, CONSIDERED AND ADJUDGED: That the bill of sale to petitioner was executed and delivered at a time when the bankrupt was insolvent and constituted *and constituted* a preference and is invalid.

IT IS FURTHER ORDERED that the contract denominated a consignment contract was and is in fact and in law a contract of sale; and

THEREFORE the petitio*ner* in reclamation of petitioner Ketcham & Rothschild is denied.

To all of which petitioner excepts and its exception is allowed.

Dated this 2d day of May, 1930.

BEN L. MOORE,
Referee in Bankruptcy.

OK. as to form.
POE, FALKNOR, FALKNOR & EMORY,
For Petitioner.

[Endorsed]: Filed this 2 day of May, 1930, at 4 o'clock P. M. [123]

[Title of Court and Cause.]

EXCEPTIONS OF ROBERT W. IRWIN COMPANY TO FINDINGS OF REFEREE.

Comes now Robert W. Irwin Company, a corporation, petitioner in reclamation herein, and excepts to the following findings of the Referee upon which is based the Referee's order of April 30th,

1930, denying the petition in reclamation of said Robert W. Irwin Company:

I.

Excepts to said Referee's finding that the bill of sale to Robert W. Irwin Company was executed and delivered at a time when the bankrupt was insolvent, and constituted a preference, and is invalid, upon the ground and for the reason that said finding and the Referee's conclusion of law based thereon are not supported by the testimony introduced in this case, nor by the applicable law.

II.

Excepts to said Referee's finding that the consignment contract herein involved was intended by the parties thereto to be a contract of sale, and was and is in fact and in law a contract of sale, upon the ground and for the reason that said finding and the conclusion of law based thereon are not supported by the testimony in this case, nor by the applicable law.

Dated at Seattle, Washington, this 2d day of May, 1930.

POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Robert W. Irwin Company.

Copy received 5–2–30.

D. G. EGGERMAN and
LEOPOLD STERN,
Attys. for Trustee.

[Endorsed]: Filed this 2 day of May, 1930, at 4 o'clock P. M. [124]

[Title of Court and Cause.]

EXCEPTIONS OF KETCHAM & ROTHSCHILD TO FINDINGS OF REFEREE.

Comes now Ketcham & Rothschild, Inc., and excepts to the following findings of the Referee herein, upon which are based the Referee's order of April 30th, 1930, denying the petition in reclamation of Ketcham & Rothschild, Inc.:

I.

Excepts to said Referee's finding that the bill of sale was delivered to Ketcham & Rothschild, Inc., and executed by the bankrupt at a time when the bankrupt was insolvent, and constituted a preference, and was therefore invalid, upon the ground and for the reason that said finding and the conclusion of law based thereon are not supported by the testimony introduced in this case, or by the applicable law.

II.

Excepts to said Referee's finding that the consignment contract herein involved was intended by the parties thereto to be a contract of sale, and was in fact and in law a contract of sale, on the ground and for the reason that said finding and the conclusion of law based thereon are not supported by the testimony in this case, and are contrary to the applicable law.

Dated at Seattle, Washington, this 2d day of May, 1930.

POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Ketcham & Rothschild, Inc.

Copy received 5–2–30.

D. G. EGGERMAN and
LEOPOLD M. STERN,
Attorneys for Trustee.

[Endorsed]: Filed this 2 day of May, 1930, at 4 o'clock P. M. [125]

[Title of Court and Cause.]

PETITION OF ROBERT W. IRWIN COMPANY FOR REVIEW OF REFEREE'S ORDER.

To Ben L. Moore, Esquire, Referee in Bankruptcy.

Your petitioner respectfully shows:

I.

That heretofore and on or about the 17th day of November, 1928, your petitioner, Robert W. Irwin Company, a corporation, filed in this matter its petition for reclamation, praying for the return to it in kind of certain furniture and merchandise, as more particularly set forth in the exhibits attached to said petition, and for the return to it of certain accounts receivable, representing merchandise and furniture sold by the above-named bankrupt, Renfro-Wadenstein, a corporation, or S. T. Hills, as assignee of said corporation, and for the return to it of certain moneys alleged to be in the hands of said Renfro-

Wadenstein, a corporation, or of the said assignee, and representing the proceeds of the sale of certain goods and merchandise, all as more particularly appears from the exhibits attached to said petition, said petition being based upon certain rights given petitioner by virtue of a certain memorandum of agreement, dated April 1st, 1928, and executed by your petitioner, Robert W. Irwin Company, a corporation, and the above-named bankrupt, a true copy [126] of which said agreement is attached to the petition in reclamation herein.

II.

That thereafter the Trustee of the estate of the above-named bankrupt filed an answer to said petition, putting at issue the material allegations thereof, and that thereafter testimony was taken upon the issues as framed by said pleadings before Cicero R. Hawkins, Esquire, Referee in Bankruptcy, and that after the completion of said testimony and after said petition had been argued before said Referee and briefs submitted to him in support of and resisting the same, the said Referee died. That thereafter the matter was submitted to Ben L. Moore, Esquire, as Referee, upon the testimony theretofore introduced, upon the briefs, and upon additional argument of counsel, and that thereafter and on, to wit, the —— day of ————, 1930, an order, a copy of which is hereto annexed, was made and entered herein upon said petition for reclamation, by the said Ben L. Moore, Esquire, as Referee.

III.

That said order was and is erroneous in the following respects:

1. That said Referee erred in ordering and adjudging that the petition in reclamation of Robert W. Irwin Company be denied and disallowed.

2. That said Referee erred in ordering and adjudging that the consignment contract, attached to the petition in reclamation, was and is in effect and in law a contract of sale. [127]

3. That said Referee erred in ordering and adjudging that the bill of sale attached to the petition in reclamation was executed and delivered at a time when the bankrupt was insolvent and constituted a preference and is invalid.

4. That said Referee erred in ordering and adjudging that the consignment contract involved was not a valid contract of consignment and that the relationship of bailor and bailee did not exist between petitioner and bankrupt.

5. That said Referee erred in failing to find that said bankrupt was solvent at the time of executing said consignment contract and at the time of executing said bill of sale.

6. That said Referee erred in failing to adjudge and find that the execution of said bill of sale attached to said petition in reclamation was not a preference but was executed for a present valid consideration.

7. That said Referee erred in failing to adjudge and order that with respect to the furniture and

merchandise contained in the bill of sale attached to the petition in reclamation there was a sufficient change in possession thereof from the bankrupt as vendor to the bankrupt as consignee and bailee for petitioner to remove the case from Remington's Compiled Statutes, Section 5827.

8. That the Referee erred in failing to order and adjudge petitioner to be entitled to the immediate possession of all accounts receivable in the hands of the Trustee which were unpaid by customers of the bankrupt, said accounts receivable representing furniture sold by bankrupt and by S. T. Hills, as assignee, said furniture being covered both by said bill of sale and by said consignment agreement. [128]

9. That the Referee erred in failing to order and adjudge that petitioner was entitled to the immediate possession of certain sums of money collected by bankrupt and by S. T. Hills, as assignee, said moneys being collections on accounts representing furniture sold, said furniture being covered both by said bill of sale and by said consignment agreement.

10. That said Referee erred in adjudging and finding that the Trustee was an existing creditor, or innocent purchaser, and as such entitled to the benefits of Remington's Compiled Statutes, Section 5827.

WHEREFORE, your petitioner, feeling aggrieved because of such order, prays that the same

may be reviewed as provided by the bankruptcy law and General Order XXVII.

POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Petitioner, Robert W. Irwin Company, a Corporation.
Office & P. O. Address,
977 Dexter Horton Bldg.,
Seattle, Washington. [129]

United States of America,
Western District of Washington,
Northern Division,—ss.

DeWolfe Emory, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for Robert W. Irwin Company, a corporation, petitioner herein; that he makes this verification for and on behalf of said petitioner for the reason that none of the officers or agents of said petitioner are now within, or reside within, King County, Washington; that he has read the above and foregoing petition for review of Referee's order, knows the contents thereof and believes the same to be true.

DeWOLFE EMORY.

Subscribed and sworn to before me this 2d day of May, 1930.

[Notarial Seal] DRAYTON F. HOWE,
Notary Public in and for the State of Washington, Residing at Seattle.

Copy received 5–2–30

D. S. EGGERMAN and
LEOPOLD M. STERN,
Attorneys for Trustee.

[Endorsed]: Filed this 3 day of May, 1930, at 11 o'clock A. M. [130]

[Title of Court and Cause.]

ORDER DENYING PETITION IN RECLAMATION OF ROBERT W. IRWIN, ETC.

In re: Robert W. Irwin, Petitioner in Reclamation.

This cause having heretofore come on for trial, the petitioner in reclamation being represented by its attorneys, Poe, Falknor, Falknor & Emory, and the Trustee in Bankruptcy by D. G. Eggerman and Leopold M. Stern, and the respective parties having introduced their evidence and the matter having been fully argued and the cause taken under advisement, and the undersigned Referee in Bankruptcy having heretofore made and filed his memorandum decision,—

IT IS ORDERED, CONSIDERED AND ADJUDGED: That the bill of sale to petitioner was executed and delivered at a time when the bankrupt was insolvent and constituted a preference and is invalid.

IT IS FURTHER ORDERED that the contract denominated a consignment contract was and is in fact and in law a contract of sale; and

THEREFORE the petitio*ner* in reclamation of petitioner Robert W. Irwin is denied.

To all of which petitioner excepts and its exception is allowed.

Dated this 2d day of May, 1930.

BEN L. MOORE,
Referee in Bankruptcy. [131]

[Title of Court and Cause.]

PETITION OF KETCHAM & ROTHSCHILD COMPANY FOR REVIEW OF REFEREE'S ORDER.

To Ben L. Moore, Esquire, Referee in Bankruptcy.

Your petitioner respectfully shows:

I.

That your petitioner, on or about the 17th day of November, 1928, filed in this matter a petition in reclamation, praying for the return to it in kind of certain furniture and merchandise, more particularly described in the exhibits attached to said petition, and for the return to it of certain accounts receivable, representing merchandise and furniture sold, all as more particularly shown in said exhibits, and for the return to it of certain moneys representing the proceeds of the sale of certain goods and merchandise and furniture, all as more particularly set forth in said petition, said petition being based upon certain rights given your petitioner under and by virtue of a certain memorandum of agreement entered into on the 30th day of March, 1928, by and between petitioner and the above-named bankrupt, a copy of which said agreement is attached to the petition in reclamation herein. [132]

II.

That thereafter the Trustee of the estate of the above-named bankrupt filed an answer to said petition, putting at issue the material allegations thereof, and that thereafter testimony was taken upon the issues as framed by said pleadings before Cicero R. Hawkins, Esquire, Referee in Bankruptcy, and that after the completion of said testimony and after said petition had been argued before said Referee and briefs submitted to him in support of and resisting the same, the said Referee died. That thereafter the matter was submitted to Ben L. Moore, Esquire, as Referee, upon the testimony theretofore introduced, upon the briefs, and upon additional argument of counsel, and that thereafter and on, to wit, the —— day of ————, 1930, an order, a copy of which is hereto annexed, was made and entered herein upon said petition for reclamation, by the said Ben L. Moore, Esquire, as Referee.

III.

That such order was and is erroneous in the following respects:

1. That said Referee erred in ordering and adjudging that the petition in reclamation of Ketcham & Rothschild, a corporation, be denied and disallowed.

2. That said Referee erred in adjudging and ordering that the bill of sale to petitioner was executed and delivered to petitioner at a time when bankrupt was insolvent and constituted a preference and is invalid.

3. That said Referee erred in adjudging and finding that said bankrupt was at any time insolvent.

4. That said Referee erred in failing to find and adjudge that said bill of sale was executed for a present and valid consideration and as such did not constitute a preference. [133]

5. That said Referee erred in failing to find and adjudge that the consignment agreement attached to the petition herein was a valid consignment agreement, creating the relationship of bailor and bailee between petitioner and bankrupt, and in finding that said contract was one of sale.

6. That said Referee erred in finding and adjudging that petitioner was not entitled to the immediate possession of the accounts receivable, representing furniture sold both by bankrupt and by S. T. Hills, as assignee, which said furniture was covered both by the consignment agreement and the bill of sale attached to the petition herein.

7. That said Referee erred in failing to adjudge and find that petitioner was entitled to immediate possession of certain cash moneys in the proceeds of the sale of certain furniture sold by bankrupt and by S. T. Hills, as assignee, which said furniture was covered by the consignment agreement and the bill of sale attached to said petition herein, which said moneys were in the possession of the Trustee at the time of filing of the petition in reclamation.

8. That said Referee erred in adjudging and finding that the Trustee was an existing creditor, or innocent purchaser, and as such entitled to the

benefits of Remington's Compiled Statutes, Section 5827.

WHEREFORE, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided by the bankruptcy law and General Order XXVII.

POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Petitioner, Ketcham & Rothschild Company, a Corporation.
Office & P. O. Address:
977 Dexter Horton Bldg.,
Seattle, Washington. [134]

United States of America,
Western District of Washington,
Northern Division,—ss.

DeWolfe Emory, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for Ketcham & Rothschild Company, a corporation, petitioner herein; that he makes this verification for and on behalf of said petitioner for the reason that none of the officers or agents of said petitioner are now within, or reside within, King County, Washington; that he has read the above and foregoing petition for review of Referee's order, knows the contents thereof and believes the same to be true.

DeWOLFE EMORY.

Subscribed and sworn to before me this 2d day of May, 1930.

[Notarial Seal DRAYTON F. HOWE,
Notary Public in and for the State of Washington, Residing at Seattle.

Copy received 5–2–30.

D. G. EGGERMAN and
LEOPOLD M. STERN,
Attorneys for Trustee.

[Endorsed]: Filed this 3 day of May, 1930, at 11 o'clock A. M. [135]

[Title of Court and Cause.]

ORDER DENYING PETITION IN RECLAMATION OF KETCHAM & ROTHSCHILD.

In re: Ketcham & Rothschild, Petitioner in Reclamation.

This cause having heretofore come on for trial, the petitioner in reclamation being represented by its attorneys, Poe, Falknor, Falknor & Emory, and the Trustee in Bankruptcy by D. G. Eggerman and Leopold M. Stern, and the respective parties having introduced their evidence, and the matter having been fully argued and the cause taken under advisement, and the undersigned Referee in Bankruptcy having heretofore filed his memorandum decision,—

IT IS ORDERED, CONSIDERED AND ADJUDGED: That the bill of sale to petitioner was executed and delivered at a time when the bankrupt was insolvent and constituted a preference and is invalid.

IT IS FURTHER ORDERED that the contract denominated a consignment contract was and is in fact and in law a contract of sale; and

Therefore the petition in reclamation of petitioner Ketcham & Rothschild is denied.

To all of which petitioner excepts and its exception is allowed.

Dated this 2d day of May, 1930.

BEN L. MOORE,
Referee in Bankruptcy. [136]

[Title of Court and Cause.]

STIPULATION RE PETITIONS FOR RECLAMATION, ETC.

This stipulation made and entered into at Seattle, Washington, on this 7th day of August, 1929, by and between Walter S. Osborn, Trustee of the Estate of the above-named bankrupt, and his attorneys, Messrs. Bausman, Oldham & Eggerman, and Leopold M. Stern and Ketcham & Rothschild, Inc., and Robert W. Irwin Company, petitioners herein, through the undersigned, their attorneys, Poe, Falknor, Falknor & Emory,—

WITNESSETH, that whereas, the above-named petitioners Ketcham & Rothschild, Inc., a corporation, and Robert W. Irwin Company, a corporation have heretofore filed herein their petitions for the reclamation of certain properties all as more particularly appears from the respective petitions of said petitioners on file herein;

AND WHEREAS, in answer to said petitions, the above-named Trustee in Bankruptcy did thereafter file his separate answer to said petitions all

as more particularly appears from said answers on file herein;

AND WHEREAS, the affirmative matter contained in the answer of said Trustee was put at issue and controverted by replies filed herein by said petitioners, all as more particularly appears therefrom;

AND WHEREAS, thereafter and on or about the 10th day of January, 1929, and at subsequent and divers times thereafter, the petitions for reclamation of said petitioners were heard upon the issues so framed and testimony introduced in support thereof before and by the Honorable C. R. Hawkins, Referee in Bankruptcy at Seattle, King County, Washington, the said C. R. Hawkins, as said Referee, having been heretofore duly empowered to hear and try said issues and the said petitioners after having presented their testimony in support of their said petitions, having rested and the said Trustee thereafter having introduced testimony in support of his answers and having rested [137] and thereafter the said petitioners having introduced testimony in rebuttal to the testimony so offered by said Trustee, and thereafter the matter having been argued by counsel for the respective parties to said Referee and briefs having been submitted to said Referee, and thereafter the matter having been submitted to said Referee for his decision upon said oral arguments and upon said briefs of the respective parties hereto, and thereafter the said Honorable C. R. Hawkins, as said Referee having, prior to the rendition of a decision

by him upon said two petitions for reclamation, died, and thereafter the Honorable Ben L. Moore having been duly appointed to act in the place and stead of the said C. R. Hawkins as said Referee;

AND WHEREAS, the respective parties hereto are desirous of submitting the matters and issues so raised by the aforesaid pleadings to the said Ben L. Moore, as said Referee, for his decision, upon the pleadings, testimony, depositions, stipulations, exhibits and evidence introduced at the trial and hearing upon the said petitions before the said C. R. Hawkins, as said Referee,—

NOW, THEREFORE, it is hereby agreed and stipulated by and between the respective parties hereto as follows:

I.

The petitions for reclamation of Ketcham & Rothschild, Inc., a corporation, and Robert W. Irwin Company, a corporation together with the issues raised by said petitions, answers controverting the same and replies controverting the affirmative matter contained in said answers, shall be submitted forthwith to the Honorable Ben L. Moore, as Referee in Bankruptcy, sitting at Seattle, Washington, in the aforesaid division and district, upon the evidence in its entirety heretofore submitted on the issues so raised to the Honorable C. R. Hawkins, Referee in Bankruptcy, now deceased, including the testimony, depositions, stipulations, exhibits and all other evidence submitted by any of the parties hereto at any of the [138] hearings before the said Honorable C. R. Hawkins, as said Referee,

subject, however, to any and all objections raised or made by the respective parties hereto and each of them to evidence offered and introduced at said hearings and subject to the rulings of the said C. R. Hawkins, as said Referee, upon the admissibility of said evidence,

II.

It is further stipulated and agreed that by this submission of said petitions and the evidence in support thereof and controverting the same as aforesaid to the Honorable Ben L. Moore, as said Referee, for his findings and decision, it is the intention of the respective parties hereto and they do hereby agree that the findings and decision of the said Ben L. Moore, as said Referee, upon said issues and upon said evidence shall be as binding and have the same force and effect as if the same had been made by the Honorable C. R. Hawkins as said Referee.

III.

It is further agreed and stipulated that when the Honorable Ben L. Moore, as said Referee, has perused the record and testimony and evidence so submitted to him as aforesaid and the briefs heretofore filed by the respective parties hereto, the parties hereto may have, should said Re*f*ree so desire, two hours aside to orally argue the matters so submitted prior to the final decision thereof by said Referee.

IV.

The record upon which the aforesaid petitions and issues are to be submitted to said Referee is to be handed to said Referee contemporaneously

with the filing of this stipulation. The names of the witness testifying for the respective parties hereto, and upon whose testimony the above matters are submitted, as as follows;

For Petitioners: Emil Rothschild, Robert W. Irwin, O. A Wadenstein, Herbert E. Smith, Truman B. Morgan, S. T. Hills, William Edris. [139]

For Trustee: William Edris, C. H. Bailey, William Hoffman.

Insufficient time having been allowed counsel for the respective parties hereto to throughly examine the record herewith submitted, as aforesaid, it is agreed and stipulated between the undersigned that either of the parties hereto may, prior to the decision of said Referee upon the matters so submitted, on motion therefor amend or correct said record and testiiony in any and all respects in which the same may, upon further examination, be shown to be incorrect.

IN WITNESS WHEREOF, we have hereunto set our hands on the day and year first above written, at Seattle, Washington.

W. S. OSBORN,
Trustee.
L. M. STERN,
BAUSMAN OLDHAM & EGGERMAN,
Attorneys for Trustee.
KETCHAM & ROTHSCHILD, INC.
By POE, FALKNOR, FALKNOR & EMORY,
Its Attorneys.
ROBERT W. IRWIN COMPANY.
By POE, FALKNOR, FALKNOR & EMORY,
Its Attorneys.

[Endorsed]: Filed this 8 day of Aug., 1929, at 2 o'clock P. M. [140]

[Title of Court and Cause.]

STIPULATION RE DEPOSITION OF ROBERT W. IRWIN.

IT IS HEREBY STIPULATED by and between the Trustee for the above-named bankrupt, through the undersigned his attorneys, and Robert W. Irwin Company, one of the petitioners herein, through the undersigned its attorneys, that the deposition of Robert W. Irwin, as a witness on behalf of Robert W. Irwin Company, one of the petitioners herein, may be taken upon oral interrogatories before Chris Hindelink, a notary public, at his offices at 602 Michigan Trust Building, Grand Rapids, Michigan, on the 27th day of December, 1928, or as soon thereafter as the attorneys representing said Trustee and said petitioner at the taking of said deposition may agree upon, provided, however, that said deposition is taken sufficient time before the 19th day of January, 1929, to enable said deposition to be transmitted to and received by the Referee in Bankruptcy at Seattle, Washington, by January, 7, 1929.

The parties hereto expressly waive the issuance of a commission herein, or any order of the District Court or Referee directing the taking of said deposition, or any formality with reference to the taking thereof. Any objection to any question pro-

pounded or answer thereto, save as to the form of a question, may be first made at the trial before the Referee.

After the witness has signed said deposition, it may, with the usual certificate and this stipulation attached, be forwarded to Judge C. R. Hawkins, Referee in Bankruptcy, L. C. Smith Building, Seattle.

Dated at Seattle, Washington, this 14 day of December, 1929.

BAUSMAN, OLDHAM & EGGERMAN,
Attorneys for Trustee in Bankruptcy.
POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Robert W. Irwin Company.

[Endorsed]: Filed this 8 day of Jan., 1929, at 10 A. M. [141]

[Title of Court and Cause.]

STIPULATION AS TO MERCHANDISE AND ACCOUNTS RECEIVABLE AND PROCEEDS THEREOF CLAIMED BY KETCHAM & ROTHSCHILD, INC., AND ROBERT W. IRWIN COMPANY.

W. S. Osborn, as Trustee in Bankruptcy, and Ketcham & Rothschild, Inc., and Robert W. Irwin Company, claimants, agree:

1. The merchandise in the possession of the Trustee and claimed by the claimants as their own property is of the invoice value of $31,119.35, as nearly as the parties hereto can at this time estimate.

2. It appearing that such merchandise is included in the properties sought to be purchased by Robert Grass in his bid dated November 30, 1928, such merchandise may be sold by the Trustee to Robert Grass free of any and all right, title, interest and adverse claim in favor of claimants, and each of them.

3. The sum of $21,783.55 out of the purchase price paid by Robert Grass shall stand in lieu of the merchandise claimed by claimants and shall be impressed with every right, title, interest and claim which the claimants had at the date of bankruptcy, and now have, in and to the merchandise itself, and nothing herein contained shall in any respect or at all affect or impair claimants' right, title, interest and claim, the purpose of this stipulation being to permit the merchandise to be sold for the $21,783.55 above [142] mentioned, and the $21,-783.55 to be substituted therefor.

4. The accounts receivable in the hands of the Trustee unpaid by the customers of the above-named bankrupt, Renfro-Wadenstein, a corporation, and claimed by the said Ketcham & Rothschild, Inc., and Robert W. Irwin Company, is of the value, as nearly as the parties hereto can estimate, of $7,005.00, based on the invoice price of the furniture so sold; and the moneys collected by S. T. Hills, as assignee, both on accounts receivable, originating prior to the time of his appointment as assignee, and on accounts receivable representing furniture so sold by said assignee, is, as nearly as the parties hereto can estimate, the sum of

$2,869.05; said properties are included in those sought to be purchased by Robert Grass in his bid dated November 30, 1928, and are also claimed by Ketcham & Rothschild, Inc., and Robert W. Irwin Company.

5. The sum of $9,874.05, out of the purchase price paid by Robert Grass, shall stand in lieu of the unpaid accounts receivable and proceeds of other accounts receivable claimed to have been collected by S. T. Hills, as assignee, in lieu of the accounts receivable and collections on other accounts receivable claimed by the said Ketcham & Rothschild, Ins., and Robert W. Irwin Company and shall be impressed with every right, title, interest and claim which claimants had at the date of bankruptcy and now have in and to said accounts receivable and proceeds of the collections of accounts receivable, and nothing herein contained shall in any respect or at all affect or impair claimants' right, title, interest and claim therein, the purpose of this stipulation being to permit said unpaid accounts receivable and the proceeds of certain accounts receivable collected by S. T. Hills, [143] as assignee, to be sold for the sum of $9,874.05, hereinabove mentioned, and that said $9,874.05 be substituted in lieu thereof. The figures used herein in so far as they represent values of merchandise, accounts receivable and collections made on accounts receivable are estimates merely and subject to revision by either party hereto at the trial on the petitions for reclamation.

Dated at Seattle, Washington, this —— day of December, 1928.

W. S. OSBORN,
Trustee in Bankruptcy.
KETCHAM & ROTHSCHILD, INC.,
By POE, FALKNOR, FALKNOR & EMORY,
Its Attorneys, Hereto Authorized,
ROBERT W. IRWIN COMPANY,
By POE, FALKNOR, FALKNOR & EMORY,
Its Attorneys, Hereto Authorized,
Claimants.

[Endorsed]: Filed this 5 day of Dec., 1928, at 2 o'clock P. M. [144]

[Title of Court and Cause.]

ORDER DIRECTING SALE TO ROBERT GRASS CONFORMABLY TO HIS WRITTEN BID.

W. S. Osborn, as Trustee, having filed his verified petition reciting that Robert Grass has made written bid dated November 30, 1928, in the sum of $150,000.00, for properties of the estate in bankruptcy in the bid and hereinafter particularly described, the original bid being on file and a copy being annexed to the Trustee's petition; and creditors, whose provable claims amount to at least 80% (in number and amount) of the total claims allowed and to be allowed herein, having, by writing annexed to the Trustee's petition, waived notice of sale and consented and requested that the bid

be accepted and sale made to the bidder according to the terms of the bid; and it appearing that the bid is the highest and best bid that has been or can be obtained, and that the sale as provided for in the bid is advantageous to the estate and should be made; and it further appearing that Robert W. Irwin Company and Ketcham & Rothschild, Inc., have filed herein their petitions praying for the reclamation of certain furniture manufactured by them and claimed by them to have been shipped the above-named bankrupt upon consignment, and that the Trustee now has in his possession furniture and merchandise claimed by the aforesaid concerns, the invoice value of which is approximately $31,119.35; and it further appearing to the court that the said Robert W. Irwin Company [145] and Ketcham & Rothschild, Inc., are, in addition to the above-named furniture and merchandise, also seeking the reclamation of all accounts receivable representing merchandise and furniture claimed to be owned by said concerns and sold by the above-named bankrupt or one S. T. Hills, as assignee, said accounts receivable being those claimed by the said Robert W. Irwin Company and Ketcham & Rothschild, Inc., to have been unpaid by the purchasers of said furniture and amounting in all to about $7,005.00, based on the invoice price of said furniture, and that said concerns are also seeking the return to them of certain moneys collected by the said S. T. Hills, as assignee, representing the proceeds of the sale of the furniture and merchandise claimed to be owned by the said concerns, for

which no accounting has been made to them, said collections amounting to about $2,869.05; and that in so far as the furniture and merchandise now in the hands of the Trustee of the above-named bankrupt is concerned, the said Robert W. Irwin Company and Ketcham & Rothschild, Inc., are willing that the same be included in the properties to be sold the said Robert Grass under his aforesaid bid, provided that 70% of the invoice price of said furniture and merchandise, to wit, 70% of $31,119.35, or the sum of $21,783.55, be taken by the Trustee out of the proceeds of the sale of said assets and held separate and apart therefrom, intact until such time as the petitions for reclamation of the said Robert W. Irwin Company and Ketcham & Rothschild, Inc., are finally decided, and to abide the outcome of said final decisions; and that in so far as the sale to the said Robert Grass of the accounts receivable, claimed to represent furniture owned by the said concerns and sold by the said bankrupt and by said Trustee, and the aforesaid moneys collected by said [146] Trustee on other accounts receivable is concerned, the said Robert W. Irwin Company and Ketcham & Rothschild, Inc., are willing that the same be included in the assets of the said bankrupt to be sold the said Robert Grass under his aforesaid bid, provided that, in addition to the aforesaid sum of $21,783.55, the sum of $9,874.05 be taken by the Trustee out of the proceeds of the sale of said assets and held separate and apart therefrom, intact until such time as the petitions for reclamation of

the said Robert W. Irwin Company and Ketcham & Rothschild, Inc., are finally decided, and to abide the final outcome of said decisions,

IT IS, THEREFORE, ORDERED:

1. That the bid of Robert Grass, as set out in writing dated November 30, 1928, signed by him and on file, be, and it is, hereby accepted and sale made to him accordingly.

2. That on receipt of the purchase price, the Trustee complete the sale by delivery of the properties bid for, free of all adverse claims and all incumbrances, including taxes for the year 1928, but excluding any adverse claims and incumbrances in favor of Winn & Russell, Inc., and in favor of the General Discount & Mortgage Corporation and/or Seattle Discount Corporation; and that the Trustee execute and deliver, if required, proper instrument or instruments of transfer accordingly.

3. The properties hereby sold are particularly described as follows:

(a) All properties listed in the Trustee's inventory, dated November 22, 1928, except approximately $900.00 worth of merchandise sold to Mr. Dinkelspeil.

(b) All notes, bills, accounts and contracts receivable, including those made by S. T. Hills as trustee and including any collections made by S. T. Hills as trustee on accounts assigned to General [147] Discount & Mortgage Corporation and/or Seattle Discount Corpora-

tion, but excluding the claims of the bankrupt corporations or either of them and the estate in bankruptcy against R. R. Renfro, Mrs. Teresa Wadenstein and O. A. Wadenstein and also excluding any right, title and interest the bankrupt corporations, or either of them, and the estate in bankruptcy may have in or to accounts assigned to Sunnyside Finance Co., except in case it shall appear that any account or accounts shall have been assigned to the General Discount & Mortgage Corporation and/or Seattle Discount Corporation, and also to the Sunnyside Finance Co., and in case the Trustee shall recover therefor as against the Sunnyside Finance Co. said recovery shall be for the benefit of General Discount & Mortgage Corporation and/or Seattle Discount Corporation as their interests shall respectively appear.

(c) The goodwill of each corporation.

(d) The right to use the corporate name of each corporation.

4. That W. S. Osborn, Trustee of the above-named bankrupts, be and he is hereby ordered and directed upon receipt by him of the said sum of $150,000.00 to set apart and reserve from said sum the sum of $21,783.55, being 70% of the invoice price of the furniture and merchandise now in his hands as said Trustee, claimed to be owned by Robert W. Irwin Company and Ketcham Rothschild, Inc., and to keep said fund intact until a

final disposition of each of the petitions for reclamation for said concerns and to abide the outcome thereof; and that the Trustee of said bankrupt be and he is hereby further ordered and directed upon the receipt by him of the said sum of $150,000.00, in addition to said sum of $21,783.55, to further reserve and set aside from the proceeds of the sale of said assets the sum of $9,874.05, being the estimated value of the unpaid accounts receivable, representing furniture and merchandise claimed to be owned by the said Robert W. Irwin Company and Ketcham & Rothschild, Inc., and the moneys collected by the said [148] S. T. Hills, as assignee, both on accounts receivable originating prior to the time of his appointment as assignee and on accounts receivable representing goods sold by said assignee, and to keep said sum intact until final disposition of each of the petitions for reclamation of said concerns, and to abide the outcome thereof.

Dated at Seattle, Washington, this 5 day of December, 1928.

C. R. HAWKINS,
Referee.

[Endorsed]: Filed this 5 day of Dec., 1928, at 2 o'clock P. M. [149]

[Title of Court and Cause.]

REFEREE'S MEMORANDUM DECISION.

This is a reclamation proceeding, initiated by the petition of Robert W. Irwin Company and the

petition of Ketcham & Rothschild Company, in which the petitioners, claiming that the bankrupts as consignees had received from petitioners as consignors certain merchandise, seek to recover from the trustee in bankruptcy, (1) certain merchandise in the possession of the Trustee, (2) certain accounts receivable (and the proceeds thereof) in the hands of the Trustee representing sales made by the bankrupts prior to bankruptcy of certain furniture alleged to belong to petitioners as consignors, and (3) certain cash in the hands of the Trustee received by him from S. T. Hills, as assignee for the benefit of creditors.

CLAIM OF ROBERT W. IRWIN COMPANY.

The Irwin Company, of Grand Rapids, Michigan, hereinafter referred to as the manufacturer, had been selling furniture of its manufacture on open account to the bankrupt, hereinafter called the dealer, for about two to five years prior to April 1, 1928.

The dealer had become very much in arrears in the payments on its account, and as a result of the manufacturer's efforts to get the accounts in proper shape Mr. Wadenstein, President of the dealer company, went to Grand Rapids in November, [150] 1927. At that time the dealer owed the manufacturer approximately $20,000.00, of which approximately $8,000.00 was for goods shipped during the year 1927 and the balance was for goods shipped prior to 1927.

Mr. Wadenstein proposed to liquidate the ac-

count by paying $2,000.00 a month commencing in November, and to try and work out some plan in the spring, before the removal of the dealer to its new store, whereby the manufacturer would be justified in extending credit for goods for the new store.

The dealer made two payments—one of $2,000.00 in November, 1927, and one of $2,000.00 in December; but made no other payments until some time in April after the purported consignment agreement was made.

In the month of March, 1928, the manufacturer received from the dealer an order for over $15,000.00 of goods for the new store but refused to ship any goods on that order until further payments should be made.

About this time, in March, Mr. Robert W. Irwin, President of the manufacturer company, had a conference about this matter, in New York, with Mr. Jack Rothschild, President of Ketcham & Rothschild, whose situation with reference to the extension of credit to Renfro-Wadenstein was known to be about the same as that of Irwin & Co.

A second conference was had in Grand Rapids, where Mr. Rothschild went to see Mr. Irwin about this matter, because Mr. Rothschild was going to Seattle. In this conference Mr. Irwin indicated his willingness to enter into a consignment contract, if agreeable to the dealer, and authorized Mr. Rothschild to act for him in negotiating some arrangement, subject however to Irwin's final approval.

Mr. Rothschild went to Seattle arriving in March, 1928, [151] and remaining about three days. As a result of his conferences with the officers of the dealer company the latter company signed the following two written instruments, (1) An agreement which now bears date April 1, 1928, providing that Robert W. Irwin Company, therein named as first party, should furnish goods to Renfro-Wadenstein, named as second party therein, on the terms and conditions therein set forth, (2) And a letter addressed to Robert W. Irwin Company, dated March 23, 1928, referring to the said instrument of April 1, 1928, and particularly to paragraph number nine thereof.

This letter of March 23, 1928, together with two copies of the contract signed by the dealer were sent to the manufacturer who received them about March 27th or 28th. When Mr. Irwin received these copies the date was blank. He wrote in the date April 1, 1928, and executed the contract immediately on behalf of his company but retained both the copies in his possession until September 5, 1928, when he sent one of these back to the dealer.

Paragraph nine of the agreement recited and provided in substance that the dealer had in its possession certain goods "as per attached list" which had theretofore been sold and delivered to it by the manufacturer on credit and had not been paid for; that the title to said goods "is hereby transferred and conveyed back" to petitioner, and should thereafter be treated as having been de-

livered to the dealer "on consignment and under and subject to all of the terms and conditions of this contract;" and that in consideration of said transfer and conveyance of the title of said goods back to the manufacturer, "that company (the manufacturer) does hereby cancel" the indebtedness of the dealer for said goods.

The letter of March 23d written by the dealer provided [152] in substance that they would furnish, shortly after the first of the month an inventory of the manufacturer's merchandise on hand, and would also furnish a "bill of sale which will act as a transfer back to your Company of this merchandise" and that any difference in the amount of the account would be taken care of in three equal payments; thirty, sixty and ninety days.

The bill of sale was not executed by the dealer until about August 6, 1928. Upon its execution it was forwarded to the manufacturer but was never filed for record.

On about October 3, 1928, the dealer made an assignment for the benefit of its creditors to S. T. Hills. On October 19, 1928, the petition in bankruptcy was filed, a receiver was appointed and thereafter trustee.

The basis of the manufacturer's entire claim in the controversy is the contract consisting of the written agreement of April 1st and the letter of March 23, which the manufacturer contends was one of bailment or consignment covering and affecting, (1) the goods in the dealer's possession

on April 1st referred to in Paragraph nine of the agreement and described in the bill of sale of August 6th, (2) The goods shipped by the manufacturer to the dealer subsequent to April 1st.

CONSIGNMENT OR SALE.

The fundamental question to be determined is whether the transaction was one of consignment or one of sale. If the goods were sold to the dealer absolutely then obviously the manufacturer would have no case. If the goods were sold to the dealer on a conditional sale then the petitioner would be barred from recovery by the failure to file a conditional sales contract for record. If, on the other hand, the dealer was merely the agent or bailee then the petitioner would have a primary right of recovery. [153]

The distinction between agency and sale is stated by Mechem as follows:

> "The essence of the agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal, who remains the owner of the goods and who therefore has the right to control the sale, to recall the goods and to demand and receive their proceeds when sold, less the agent's commission, but who has no right to a price for them before sale or unless sold by the agent."
>
> Mechem on Sales, sec. 43.

The Supreme Court of the United States marked the distinction between bailment and sale in the following language:

"The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the transaction is a sale."

Sturm vs. Boker, 150 U. S. 312; 27 L. Ed. 1093.

This rule of distinction was later reaffirmed as in the case of Ludvigh vs. American Woolen Co., 31 A. B. R. 481; 231 U. S. 522.

In the latter case, however, the court indicated that where the controversy is not limited to the parties to the agreement, and the rights of creditors are involved, there may be other circumstances controlling and establishing that the contract is a mere cover for a fraudulent or illegal purpose.

The Court of Appeals for this circuit following the Ludvigh case has held;

"To constitute a sale, there must have been in the contract a vendor and a vendee, and a provision for a transfer of property by the vendor to the vendee, and a provision for a transfer of property by the vendor to the vendee, and an obligation by the vendee to pay an agreed price therefor, or the circumstances outside the contract must have been such as to show that it was the intention of the parties

to make of the contract a fraudulent concealment of an actual sale." [154]

Miller Rubber Co. vs. Citizens' Bank, 37 A. B. R. 542; 233 Fed. 488.

General Electric Co. vs. Brower, 34 A. B. R. 642; 221 Fed. 597.

Matter of King, 45 A. B. R. 95; 262 Fed. 318.

Our inquiry, therefore, must extend not only to the terms of the written instrument but also to the circumstances outside the written contract.

First, as to the written instrument. This embodies some elements which are more in harmony with a transaction of consignment, and other elements which partake more of the nature of a sale. In construing the contract;

> "It is necessary to ascertain and give effect to the dominant thought regardless of formal statement for the true nature of the transaction depends less on the terms in which it is described than upon the rights and liabilities which it creates."
>
> In the Matter of Eichengreen, 9 A. B. R. N. S., 699, 704; 18 Fed. (2d) 101.

Turning to a consideration of these elements of the contract, we find:

1. The manufacturer agrees to "ship goods on consignment" in such amount as shall be satisfactory to it. The transaction is thus expressly denominated a consignment. This designation, however, is little, if anything more, than a mere label, the truth or validity of which depends on the force

and effect of the provisions fixing the respective rights and obligations of the parties.

2. The dealer agrees to pay all freight and carriage charges immediately on arrival of goods. It further agreed that in case any of the goods shall at any time be recalled by the manufacturer the dealer will crate them and place them on cars at Seattle; and also in the event of termination of the contract, if the dealer does not elect to sell the goods to the dealer, then [155] the dealer shall crate the goods and place them on cars at Seattle.

This obligation of the dealer to pay freight and similar charges has been pointed out by the courts in some cases as one of the indicia of a sale. In other cases a different view has been expressed. Probably these expenses would ordinarily be placed on the owner of the goods, whether that be the manufacturer or the dealer. It is competent, however, for the parties to a consignment agreement to enlarge or restrict their mutual rights and duties, with limitations, without changing the nature of the contract. The imposition on the dealer of this duty to pay these charges, may weigh in some slight degree in the balance, but is far from determinative.

3. The goods are to be insured in the name of the petitioners. This would indicate consignment and is to be weighed accordingly.

4. (a) The dealer is to hold the goods exclusively for resale for the account of the manufacturer at not less than the net invoice price, and pending sale shall care for the goods for the manufacturer, but at the dealer's expense.

(b) The dealer's compensation is called commission and fixed as the difference between the invoice and sale price.

(c) The dealer shall furnish to the manufacturer on the 1st and 15th of each month an itemized record of the "consigned goods" separate from other sales.

(d) The dealer shall make remittance on the 20th of each month for goods sold during the preceding month.

(e) If the dealer, because of its failure to receive from its customer payment for goods sold, shall not be able to make payment in cash, it shall give the manufacturer a demand note "collateraled by the assignment of accounts receivable."

(f) The dealer guarantees the credit of all customers and the collection of all accounts. [156]

(g) The dealer shall pay a carrying charge of 7% for the time after the date of shipment that the merchandise remains unsold.

(h) The consigned goods or the accounts representing the same and the proceeds thereof shall continue to belong to and be the property of the factory until remittance therefor shall have been made.

Of the foregoing, items b, f, and g, are peculiar to neither a consignment nor a sale. The dealer's compensation is called a commission, but is determined by the identical factors which fix a dealer's profit. The dealer keeps the difference between the invoice and the sale price, and pays all expenses. The name by which we designate the residuum left to him is immaterial.

The guaranty of accounts and their collection is not a distinguishing mark. In that respect a dealer who buys and sells is for all practical purposes on the same footing as a *del credere* agent. The obligation to pay a carrying charge on goods unsold after ninety days is consistent with either a consignment or a sale. The parties to a consignment contract might properly agree upon such a provision as an incentive for the consignee to make a prompt turnover of the goods. With equal legal propriety the parties to a sale might enter into a credit arrangement embodying this feature. In fact we find an analogous, or perhaps an identical, credit arrangement called a "frozen credit" which was in use between Ketcham & Rothschild and Renfro & Wadenstein when goods were being sold to the latter on credit.

The remaining items of this paragraph must be considered more closely in connection with the contract as a whole, taking into account the omissions therefrom as well as the expressions therein. [157]

5. The contract is terminable at the will of either party. In case of such termination the manufacturer shall have the right at its option to require the dealer to keep and pay for the goods then remaining on hand.

The contract says that the dealer shall hold the goods exclusively for resale for the account of the factory. This provision standing alone would tend very strongly to establish a consignment.

Does this holding of the goods exclusively for re-sale exclude the dealer from the right to pur-

chase at any time? There is no express prohibition on the dealer stated in the contract. On the contrary there is a provision in the contract (Par. 10) which, in effect obligates the dealer to buy these goods whenever the factory elects to require it. There is no logical nor legal reason presented in the contract, in the relations of the parties, nor in the surrounding circumstances, for barring the dealer from the right to purchase. The factory had been selling to the dealer outright for a long period of time and was unquestionably willing to continue so long as and whenever it received pay for its goods. Clearly the dealer might become the purchaser of the goods. The question remains whether it did become the purchaser—either absolute or conditional.

The contract provides that the resales shall be made for the account of the manufacturer and provides for itemized records of sales and remittances. Some of the omissions of the contract may here be noted. It omits any requirement that the goods be kept segregated from the dealer's general stock, that the goods be earmarked to show that they are consigned goods belonging to the factory, that the accounts receivable or conditional sales contracts for goods resold to customers should cover [158] consigned goods only and not intermingle other goods under the same account or contract, that the accounts for consigned goods sold and the proceeds thereof shall be kept separate and not intermingled with the accounts and funds of the dealer, or that the identical accounts or identical

proceeds thereof should be transmitted to the manufacturer. Thus while the contract named the manufacturer as the owner, it permitted to the dealer an ostensible ownership of the goods and a dominion both over the goods and the proceeds thereof.

In harmony with this dominion, is the provision of the contract requiring the dealer to assign accounts receivable as collateral for unpaid balances to the manufacturer.

The assignment by the dealer presupposes its ownership of these accounts. The assignment to the manufacturer presupposes its non-ownership of these accounts. The provision for collateral is therefore inconsistent with the theory of consignment.

The terms of the contract which require periodical itemized reports and remittances for goods sold, and which provides that the goods and the accounts and proceeds shall be the property of the manufacturer until remittance made, might find a place either in a consignment or a conditional sale contract. Those terms, however, when construed in conjunction with the provisions for using the accounts as collateral, cannot be held to establish the contract here as one of consignment.

The contract provides that the goods shall be resold for not less than the invoice price. It does not however specify a price at which they shall be sold. One of the tests of consignment or sale is whether the price of resale is fixed by the furnisher or left to the receiver. The courts have differed on the question whether the naming of a minimum

price by the manufacturer constitutes such a fixing. [159]

One of the "indelible" marks of a consignment is the right of the manufacturer to repossess. The provisions of the contract looking to the repossession of the goods by the manufacturer are to be found in paragraph eight and paragraph ten.

Paragraph eight reads as follows:

> "In case any of said goods shall at any time be recalled by said party of the first part, the said party of the second part shall crate and place on cars at Seattle."

Paragraph ten provides:

> "In the event that party of the first part shall not elect to sell said goods to party of the second part, then upon termination of the contract it shall be the duty of party of the *second part, then upon termination of the contract it shall be the duty of party of the* second part to crate and place on cars at Seattle, unless otherwise directed by party of the first part."

Paragraph ten confers a right to recall or repossession of the goods only in the event of a termination of the contract. It contemplates no further continuance of the contract when the recall is once exercised. Is any right of repossession during the life of the contract given by paragraph eight? If the last-named paragraph stood alone it could be said with much force that its terms presuppose a right to recall at any time, and where such a right is necessarily presupposed it is, in

legal effect, granted. But the paragraph does not stand alone. It must be considered in connection with the other provisions of the contract. It may be construed as merely prescribing the duties of the dealer when the manufacturer exercises the right of repossession granted by section ten, but as not creating any such right.

It may be said, however, that such construction would make of paragraph eight a mere ineffective duplication of paragraph ten. But on the other hand it might be said with equal force that if paragraph eight confers a right of recall at any time, then paragraph ten is merely repetitious and adds no rights to those granted in paragraph eight. [160]

The contract was devised, proposed, and drafted with deliberation by the manufacturer. It would have been extremely simple to use clear and express terms creating the right of recall during the life of the contract—if such right were within the contemplation or agreement of the parties. Such terms were not employed. It is apparent, therefore, that the parties contemplated the dealer's dominion over the goods during the life of the contract. That dominion could be terminated only by the termination of the contract. Manifestly, the provisions of paragraphs eight and ten were merely designed to give the manufacturer a means of protecting its reserved title or lien in case financial disaster or other event made it desirable for the manufacturer to terminate the contract and discontinue its business with the dealer. A sale rather

than a bailment was in the contemplation of the parties.

These conclusions are in accord with the reasoning and conclusions of the court in re:

> Eichengreen, 18 Fed. (2d) 101; 9 A. B. R., N. S., 699; (affirmed as) Reliance Shoe Co. vs. Manly, 25 Fed. (2d) 381; 11 A. B. R., N. S., 560.

In that case the dealers agreed:

> " . . . . that we will not claim any right, title, or interest in the merchandise shipped us, or interfere with or prevent you from recovering your goods when you so desire to do."

Those terms are far stronger than the provisions of paragraph eight in the contract here involved, yet the court upon a consideration of the whole contract limited their scope and held the contract to be one of sale.

Vital features of the contract under consideration are the rights to terminate the contract at the will of either party and in the event of such termination the right of the manufacturer at its option to recall the goods then on hand or to require the dealer to keep and pay for them. [161]

The manufacturer contends in the language of the court's opinion in the matter of Eichengreen, 18 Fed. (2d) 101; 9 A. B. R., N. S. 699, that:

> " . . . . an agreement on the part of the dealer to purchase goods, either at his own option, or at the option of the manufacturer, upon a certain contingency, does not merely

create an agreement of sale. A valid contract of consignment may provide for a change of relationship during the course of the transaction; but, until the contingency appears the agreement remains one of consignment."

In further support of this contention the following cases are cited by the petitioner:

In re Sachs, 21 Fed. (2d) 984; 10 A. B. R., N. S., 505.

Mitchell Wagon Co. vs. Poole, 235 Fed. 817; 37 A. B. R. 656.

In re Galt, 124 Fed. 64; 13 A. B. R. 575.

In re Harris & Bacherig, 214 Fed. 482.

Franklin vs. Stoughton Wagon Co., 168 Fed. 857; 22 A. B. R. 63.

McCallum vs. Bray Robinson Clothing Co., 24 Fed. (2d) 35, 11 A. B. R., N. S., 452.

In re Pierce, 157 Fed. 757; 19 A. B. R. 644.

McKenzie vs. Roper Wholesale Grocery Co., 70 S. E. 981.

Rockmore vs. American Hatters & Furriers, Inc., 15 Fed. (2d) 272, 8 A. B. R., N. S., 867.

Brandsford vs. Regal Shoe Co., 237 Fed. 67; 38 A. B. R. 450.

Ellet-Kendall Shoe Co. vs. Martin, 222 Fed. 851, 34 A. B. R. 502.

In re Thomas, 231 Fed. 513; 36 A. B. R. 600.

The District Court in the Eichengreen case, and the Circuit Court of Appeals which reviewed that case under the title [162] of Reliance Shoe Company vs. Manly (25 Fed. (2d) 381; 11 A. B. R., N.

S., 560), both held the transaction there involved to be one of sale and not one of consignment.

The Sachs case was reviewed in the Circuit Court of Appeals under the title of Joseph vs. Winakur, 30 Fed. (2d) 510, 13 A. B. R., N. S., 259, where it was held that the instrument in question was a chattel mortgage and did not effect a bailment.

In Mitchell Wagon Company vs. Poole the decision was based primarily on the right of the manufacturer to reclaim the goods at any time.

In the Galt case the contract was quite similar, if not identical in its terms, with the contract in the Mitchell Wagon Company case. In its opinion the Court used the following language in the Galt case:

> "The clause in the contract giving an option to the company to require Galt to give his note or to pay cash, or to store subject to the order of the company, the goods not sold within twelve months, is probably the strongest clause in the contract to indicate a sale; but as suggested by the Supreme Court of Illinois in Lenz vs. Harrison, 148 Ill. 598, while it might have such force considered alone, taking it with the whole contract, it was seemingly incorporated to compel the agent promptly to sell and report sales within the time stated."

In the Harris & Bacherig case:

> "The consignment contract expressly reserves title in the consignor with the right to

demand the return of the unsold goods . . . . "

In the Franklin vs. Stoughton Wagon Company case the Court says that the contract:

" . . . . contains a plain provision that the goods are at all times subject to the order of the Wagon Company until they are sold, and we think there is no doubt about the right of the Wagon Company under the contract to require the goods returned."

In re Pierce, the option was vested in the dealer and not in the manufacturer. In that respect the decision in that case would seem to be in conflict with many of the authorities [163] including the opinion of Judge Neterer on the claim of Regal Gasoline & Engine Company in the case of Caldwell Machinery Company, 215 Fed. 428, 435.

In McKenzie vs. Roper Wholesale Grocery Co., the Court said:

"The test seems to be this; If the person to whom the possession of the property is delivered gets it by virtue of a contract of purchase (i. e. gets it under such circumstances that the person parting with the possession can sue for the purchase price irrespective of whether the person to whom the possession is delivered as sold or otherwise disposed of the goods) the contract is one of conditional sales, notwithstanding it may impose limitations upon the purchaser's right to dispose of

the property and may require a definite plan of accounting."

Rockmore vs. American Hatters & Furriers, Inc., does not seem to have any bearing on the construction of an optional clause to require the dealer to purchase.

In Bransford vs. Regal Shoe Company the manufacturer had the right to recall the goods at any time.

In Ellet-Kendall Shoe Co. vs. Martin, the manufacturer had the right to recall any of the goods at any time.

In each of the foregoing cases cited by petitioner where the Court applied the above-stated rule as to the optional clause, the option was dependent upon some outside condition or contingency such as the dealers breach or failure to perform the contract, or if goods remained in the dealers hands at the expiration of a fixed period of time, or if the dealer should sell or close out his business, or if the dealer became bankrupt. In the case at bar the option is not dependent on any outside condition or contingency but may be exercised by the manufacturer at its will at any time by terminating the contract. The manufacturer here has it in its power independently of any contingency to impose at any time upon the dealer the obligation to pay the purchase price of the goods even though they have not been resold. [164]

This optional right of the manufacturer to compel the dealer to pay for the merchandise at will

is one of the controlling factors of the contract and tips the scales on the side of the sale. This conclusion does not conflict with the opinion in the case In re Caldwell Machinery Company, 215 Fed. 428. In that case the trustee based his position on the 9th paragraph of the contract which contained a covenant to purchase, but this 9th paragraph had been closed out and stri*k*en. Judge Neterer held in effect that other clauses in the contract referring to the 9th paragraph were ineffective to reincorporate that paragraph in the contract.

The petitioner has also relied upon the following Washington cases: Inland Finance Company vs. Inland Motor Car Company, 125 Wash. 301; Ranson vs. Wickstron, 84 Wash. 419; Elers Music House vs. Fairbanks, 80 Wash. 379; Hansen Service Inc. vs. Lunn, 55 Wash. Dec. 115.

In each of these cases there was either no obligation on the dealer to pay for the goods unless and until the same were sold or else there was a right on the part of the manufacturer to repossess the goods at any time. In the Hansen Service Inc. case the contract provided:

> "Consignor may at any time, without notice with consignee, take possession of any goods shipped to the consignee hereunder."

The court referred to this as:

> "One of the most important features of the contract herein."

Those Washington cases are, therefore, to be distinguished from the case at bar.

The conclusion that the contarct under consideration was one of sale rather than one of consignment is further supported by the surrounding circumstances. These circumstances are also entitled to consideration under the rule laid down by the Circuit [165] Court of Appeals in the cases of General Electric Co. vs. Brower and Miller Rubber Co. vs. Citizens Bank hereinabove quoted.

The dealer had been purchasing furniture from the manufacturer on open account for a number of years but became unable to meet its obligations to the manufacturer and to other creditors in due course of business. It gave notes, renewal notes and postdated checks. This situation became serious in November, 1927, and critical in March, 1928, when the manufacturer refused to fill an order from the dealer for $15,000.00 worth of goods until further payment be made on the account. This led to the contract of April 1, 1928. This contract was never placed on record nor made public. The goods of the manufacturer's make, including those in the possession of the dealer on April 1st and those subsequently shipped were mingled with other goods in stock and were not tagged or marked in any way to show that they were consigned goods. Some of these goods were resold on open account and some on conditional sales contract. The account on conditional sales contract with any one customer would in some instances include the so called consigned goods to-

gether with other goods. The payments made by such customers would be applied generally to his account without being allocated or credited to any specific item of goods bought.

The dealer, prior to the contract of April 1st, made a practice of assigning its accounts to discount companies to finance the carrying on of its business. It continued this practice until it ceased doing business and included in the account thus assigned those which represented the so-called consigned goods. The proceeds of the so-called consigned goods were not kept separate or apart but were mingled in one deposit with the dealer's other funds.

The dealer did not comply with the provision of the contract that it should make reports upon the 1st and 15th of each month and make remittances for goods sold on the 20th of each month. These practices were tolerated by the manufacturer. [166]

This toleration of departures from the letter of the contract and of practices out of harmony with relation of principal and agent were foreshadowed by Section 7 of the contract. That section provides:

> "Neither the invoicing of said consigned goods to the party of the 2nd part nor the charging of the same to it on the books of said party of the first part, nor the delivering of such transactions, whether for convenience or otherwise, in any manner or form inconsistent herewith shall be deemed to change or dis-

continue this agreement or prevent said consigned goods from being held, handled and remitted for under and according to the terms hereof."

That section of the contract apparently reflects an intention of the parties to carry on business in a manner that carried no warning to the public of any bailment but saving to the manufacturer the secret right to repossess the goods in case of disaster. It would seem that this contract was intended by the parties to conceal an actual sale and that it would come within the rule stated in Miller Rubber Company vs. Citizens Bank, *supra.*

WHAT GOODS WERE SUBJECTED TO THE OPERATION OF THE CONTRACT.

If the contract of April 1st were in legal effect one of consignment it would then be necessary to determine what goods were subjected to its operation. The petitioner claims that by virtue of said contract it retained the title to, (1) goods shipped by it subsequent to April 1st, and (2) the goods in the possession of the dealer on April 1st.

First as to the goods shipped subsequent to April 1st. Of the goods shipped subsequent to April 1st the dealer reported only three items as sold. This report was made under date of August 4th. The items so reported were those bearing numbers 1287, 1337 and 1355. They had been shipped on April 13th, April 13th and April 24th respectively. The manufacturer in its letter of September 5th to the dealer challenged the inclu-

sion of those items in the report on the ground that they "were your [167] property as they were not included in the retransfer of title to us."

(See Petitioner's Exhibits 51, 48 and 56 and Irwin deposition page 47.)

This clear declaration is not overcome by other expressions in the testimony of a more or less general character that the shipments were made under the contract. By this declaration the manufacturer not only admitted but affirmatively asserted that the goods shipped after April 1st and up to the time of the letter were the property of the dealer. The evidence shows further that no shipments were made subsequent to September 5th. In other words, all the goods shipped after April 1st were declared by the manufacturer to be the property of the dealer.

Secondly, as to the goods in the possession of the dealer on April 1st.

The Trustee contends that the title to the goods in the possession of the dealer on April 1st was never passed to the manufacturer for the reasons, (1) that there was no transfer of possession and the bill of sale was never made a matter of record as required by Sec. 5827, Remington Compiled Statutes, (2) that because of the dealer corporation's alleged insolvency the transfer, made in consideration of an antecedent indebtedness, was invalid under the trust fund doctrine.

The letter of March 23d, which was a part of the contract of April 1st, and qualified Paragraph nine thereof, provided that the dealer should exe-

cute a bill of sale to the manufacturer of the goods on hand. The first bill of sale submitted by the dealer included more goods in value than the amount of the antecedent indebtedness and was rejected by the manufacturer as unsatisfactory.

The manufacturer suggested that the dealer retain title to all the goods of what was known as the Phoenix line and to part of the Royal line and should make some cash payments. [168] As shown by the correspondence there was no meeting of the minds of the parties on the goods to be included prior to August 6, 1928. A bill of sale bearing date of August 6th and acknowledged August 14th was executed by the dealer and sent to the manufacturer. In the meantime the manufacturer had been holding on his desk the executed duplicate originals of the so called consignment agreement. It was plainly indicated that the contract was being withheld from the dealer until a satisfactory bill of sale should be delivered. Finally on September 5th the manufacturer wrote:

> "We are duly in receipt of the corrected bill of sale of Royal goods and enclose herewith a copy of the consigned agreement."

The petitioner contends that the statute (Sec. 5827, Remington) requires the recording of a contract only "where the property is left in the possession of the vendor" and that the property included in the Irwin Bill of Sale was not left in the possession of the vendor within the meaning of that statute. The Washington cases cited by the petitioner of which perhaps the strongest is Has-

kins vs. Fidelity National Bank, 93 Wash. 63, declare the rule that as against creditors and subsequent purchasers it is not essential in all cases that there be an actual manual delivery, but they say further that such possession as a purchaser can reasonably take must be taken. In the Haskins case the vendee (or the mortgagee as it was held to be) by its agent checked over certain lumber in the yard of the vendor and employed someone to haul the lumber from the mill. There was some evidence that a small portion of the lumber was actually hauled. The major portion of the lumber, however, was in the yard at the time the vendor subsequently made an assignment for the benefit of his creditors. The facts in the Haskins case are far different from the facts in the case at bar. Here the contract of April 1st apparently contemplated a transfer *in praesenti* of all the goods in the dealer's [169] possession. This was qualified and modified, however, by the contemporaneous letter dated March 23d which provided that the title to the goods to be transferred should be so transferred by bill of sale thereafter to be executed. The execution and delivery of this bill of sale were held in suspension and the bill of sale was not accepted until September 5th. In the meantime the furniture to be transferred was not identified and neither the amount nor the articles to be transferred were finally determined until the bill of sale of August 6th and the acceptance on September 5th of an amendment of that bill of sale. At no time either prior or subsequent to September 5th were the goods checked over or

segregated, but on the contrary they were mingled with the other goods of the dealer in its general stock. It is apparent therefore that the manufacturer did not take "such possession as a purchaser can reasonably take."

The facts in the case at bar are quite similar to those in Matter of McCrory, 11 A. B. R., N. S., 437 where the court denied the petition for reclamation.

The Trustee invoked the rule of Thompson vs. Huron Lumber Co., 4 Wash. 600, that the property of an insolvent corporation is a trust fund for the benefit of its creditors, and contends that the attempted transfer of the goods in the dealer's possession to the manufacturer was preferential and invalid.

The Supreme Court of the State of Washington has held, in Nixon vs. Hendy Machine Works, 51 Wash. 419, and repeatedly in other cases that when a corporation is not able to pay its debts in due course of business, it is insolvent as far as creditors are concerned. Some doubt was cast on this being the sole test by certain expressions in Rosling vs. Evans, 123 Wash. 93, where the court apparently considered also the relation of assets to liabilities. [170]

Later, however, in the case of Brooks vs. Parsons Company, 124 Wash. 300, 303, the Court said:

> "A corporation which cannot pay its debts in the ordinary course of business is insolvent, even though the reasonable value of its assets may exceed the amount of its liabilities."

The testimony leaves no room for any conclusion other than that the dealer was unable to meet its obligations in the ordinary course of business. As far back as May, 1927, the dealer asked its creditors to accept renewal notes, stating it was hopeful that some time within the next few months it could get its decks clear so that it could approximate the maturities of its obligations. But this the dealer was never able to accomplish. It was subjected to repeated and insistent demands for the payment of long overdue obligations and was compelled to resort not only to renewal notes but to postdated checks in its effort to keep going. Many of the creditors the dealer owed when it failed had claims against the dealer that were owing in March, 1928. It is apparent, therefore, that under the State rule the dealer was insolvent in March, 1928. It may be said further that there is no convincing and competent testimony to establish the fact of solvency under any rule of comparing asserts with liabilities.

The petitioner contends that even if the dealer were insolvent in April, 1928, it would not follow that the bill of sale was an unlawful preference. The petitioner bases his contention on the authority of 14a C. J. 899, Rosling vs. Evans Co. *supra,* and Terhune vs. Weise, 132 Wash. 208. The petitioner's theory is that the dealer gave to the manufacturer a transfer of goods previously sold "in consideration for the shipment of some $20,000.00 worth of merchandise on consignment, which was of material and necessary assistance in the new venture, and a cancellation by the petitioners of the indebtedness created by the

[171] sale of the merchandise which was transferred back."

The contract itself recites that the consideration for the transfer and conveyance of the goods back to the manufacturer is the cancellation of the indebtedness of the dealer to the manufacturer. It is said in the Terhune case that:

> " . . . . where a present valuable consideration passes to the insolvent corporation from the creditor, the amount paid by, or secured from, the insolvent to such creditor cannot constitute preference."

So far the terms of the contract disclose the only consideration was not a present one but was the cancellation of the antecedent indebtedness. Neither the agreement in the contract to ship on consignment nor the shipment itself would bring this situation within the principles of the Terhune case. The promise of the manufacturer to ship was purely an optional one because it was obligated to ship goods ordered by the dealer only in such amount as should be satisfactory to the manufacturer. The actual shipments were to be made with the reservation that the manufacturer could at any time terminate the contract and recall the goods. So there was no binding obligation in this case to render financial assistance as there was in the Terhune case. In this case the manufacturer merely undertakes it at its own unfettered option to furnish and leave in the hands of the dealer only such goods and at such times that its own protection may be assured or to furnish and leave no goods whatever.

CLAIM OF KETCHAM & ROTHSCHILD.

The Ketcham & Rothschild contract and accompanying letter of March 23d are identical in their terms with the Irwin & Co. contract and letter. The negotiations for the execution of the contact were the same. Ketcham & Rothschild's business and credit relations and position with the dealer were closely similar, although the former does not seem to have had any orders on hand which it withheld from shipment pending payment on old accounts. [172] The history of carrying out the terms of the agreement (with the exception hereafter noted) was practically the same in the cases of both petitioners, Ketcham & Rothschild may not have been quite as lax in some respects as Irwin & Co., yet the dealer did not carry out the requirements of the contract with respect to making reports and remittances. On the other hand the testimony was more direct in the Rothschild case than in the Irwin case that the manufacturer knew that the dealer was continuing the practice of assigning accounts.

The only substantial difference between the cases of the two petitioners relates to the bill of sale transferring goods on hand back to the manufacturer.

The letter of March 23d, was a part of the contract. It provided for the subsequent execution of a bill of sale. Such a bill of sale was executed on April 16th, and delivered to Ketcham & Rothschild. It was filed in the office of the Auditor of King County, Washington, on April 24th, which was with-

in the statutory ten day period. This bill of sale, however, is here invalid because of the vendor's insolvency.

In the Irwin Company case and in the Ketcham & Rothschild case it is my conclusion that, (1) The contracts are contracts of sale and not of consignment, (2) The circumstances outside the contracts require that they be given the legal effect of sales, and (3) there was no valid transfer of goods from the dealer to the petitioner.

Both petitions are denied and an order may be entered accordingly.

Dated at Seattle, in said District, this 23d day of April, 1930.

BEN. L. MOORE,
Referee in Bankruptcy. [173]

#9085. Renfro-Wadenstein, a Corp., and Renfre-Wadenstein Furniture Co.

Certificate on review dated December 31, 1930.

[Endorsed]: Filed Dec. 31, 1930. [174]

[Title of Court and Cause.]

DECISION.

February 5, 1931.

This case is before the court on petition for review. The parties are in substantial agreement on the Referee's findings: That the bankrupt was engaged in the retail furniture business at Seattle; that Robert Irwin & Co., and Ketcham & Rothschild, Inc., were engaged in the manufacture of furniture

at Grand Rapids, Michigan, and Chicago, Illinois, respectively; that in November, 1927, the bankrupt owed Irwin & Co. approximately $20,000.00, of which $8,000.00 was for goods shipped during 1927,—the balance prior to that time; that in November, 1927, bankrupt agreed to liquidate the account by paying $2,000.00 per month, beginning in November, 1927, and paid $2,000.00 in November, and $2,000.00 in December. In March, 1928, bankrupt placed [175] an order for $15,000.00 with Irwin & Company, who refused to ship until existing indebtedness was arranged for. During 1927 and until March, 1928, bankrupt had a so-called "frozen credit" with Ketcham & Rothschild up to $15,000.00, bankrupt to pay interest at 7% per annum for the use thereof, and any merchandise bought in excess of that sum to be paid on the usual terms. In March, 1928, bankrupt owed Ketcham & Rothschild approximately $16,000.00 or $17,000.00; all of which was evidenced by negotiable notes. In March, 1928, Irwin & Company and Ketcham & Rothschild had a conference about their respective accounts, and Rothschild came to Seattle, and on March 23, 1928, the bankrupt signed and delivered a so-called "consignment agreement," and a letter dated the same day; and Ketcham & Rothschild signed the agreement in Chicago on March 30, following, and bankrupt signed a similar agreement for Irving & Company on the same day in duplicate in blank, which were mailed to Irwin & Company and received by them on March 27 or March 28, and on April 1 dated the contracts and

signed them, but retained both in their possession until September 5, 1928, when one copy was sent to the bankrupt.

The so-called "consignment agreement" in substance provides that all merchandise shall be shipped F. O. B. factory, invoiced to the bankrupt, and shall be "charged provisionally to the consigned account" of bankrupt; the amount to be shipped to be determined by the manufacturer; the bankrupt agrees to accept all goods so shipped, [176] pay all freight and carriage charges, insure the same in the name of the manufacturer, care for the goods pending sale at its expense; goods to be held for "resale for account of said party of the first part at prices not less than the net invoiced price"; bankrupts to retain by way of commission on sales all sums above invoiced price; keep an itemized record of sales distinct from its other sales, and on the first and 15th day of each month furnish a list of sales of consigned goods sold during the preceding half month, giving selling price, terms, names and addresses of purchasers, to remit all moneys collected until the invoiced price is fully paid on the 20th of each month for goods sold during the preceding month; if collection has not been made the bankrupt to execute its demand note "collateralled" by the assignment of accounts receivable equal to the payment due, and guarantee the credit of customers on account of sale of goods, to pay a carrying charge equal to seven (7%) per cent after 90 days from date of shipment for merchandise unsold, carrying

charge to be paid the first day of January and July of each year; in case goods shall be recalled, the bankrupt agrees to crate and place on car, Seattle; the contract to continue until terminated by written notice of either party to the other. On termination shipper "shall have the right, at its option, to require the party of the second part to keep and pay for the consigned goods then remaining on hand, at the invoiced price thereof," to be paid for [177] 25% every thirty days until fully paid; the consigned goods, or the accounts representing the same and the proceeds thereof, to be the property of the shipper until remittance made and received.

Paragraph 9 of the so-called "consignment agreement" stated and provided that the bankrupt had in its possession certain goods as per "attached list," which had theretofore been sold and delivered to the bankrupt by the company on credit and had not been paid for; that the title to said goods is hereby transferred and conveyed back to the company, and should thereafter be treated as having been delivered to the bankrupt "on consignment and under and subject to all the terms and conditions of this contract"; That in consideration of said transfer and conveyance of the title of said goods back to the company, that company "does hereby cancel indebtedness of the bankrupt for said goods."

The letter further provided, in substance, that bankrupt would furnish, shortly after the first of the month, an inventory of the Company's mer-

chandise on hand and would furnish a "bill of sale" which will act as a transfer back to your company of this merchandise, and that any difference in the amount of the account would be taken care of in three equal payments, 30, 60, and 90 days.

The bankrupt on August 6, 1928, executed a bill of sale transferring certain items of furniture to Irwin & Company. On September 5, Irwin & Company accepted the bill of sale, and sent to the bankrupt one of the [178] executed copies of the so-called "consignment agreement." Between March and September 5, the bankrupt and Irwin & Company were having correspondence with relation to the so-called "consignment agreement." This bill of sale was never filed for record. No list of goods referred to in Paragraph 9 of the consignment agreement was attached to the contract at any time. At the time the contract was signed by the bankrupt, it furnished to Rothschild a memorandum of its stock and records upon which the approximate figures of the amount of goods of Ketcham & Rothschild were predicated.

April 16, 1928, bankrupt executed and delivered to Ketcham & Rothschild a bill of sale for the goods on hand at the time of the execution of the so-called "consignment agreement." This bill of sale was filed for record April 24, 1928, in the Auditor's Office of King County, Washington, the county of the bankrupt's place of business.

The bankrupt made some reports of sales, but not as required by the contract of March 30, 1928. The bankrupt paid Ketcham and Rothschild for all

goods which the bankrupt reported sold. All these payments were made in cash with the exception of one payment, which was by note.

After the execution of the so-called "consignment agreements," and bills of sale, Irwin & Company and Ketcham & Rothschild, respectively, credited the account with the value of goods set forth in the respective bills of sale. Irwin & Company on August 20, 1928, made its [179] last shipment of goods to the bankrupt. At the time the bankrupt signed a so-called "consignment agreement," and thereafter all the furniture of Irwin & Company and Ketcham & Rothschild in the possession of bankrupt was intermingled with other furniture. There was no physical change of possession, or segregation. The bankrupt was unable to pay its obligations in due course of business prior to November, 1927, and was insolvent under the state laws, which facts were known to both petitioners. The evidence does not fairly disclose the liabilities and reasonable value of the assets at the time of the so-called "consignment." All shipments made after March 30, 1928, were made directly on bills of lading to the bankrupt in substantially the same manner that shipments had been made prior to the execution of the so-called "consignment agreement." All invoices were marked, "terms special." The same phrase had been used on some invoices of goods prior to March 30, 1928.

The furniture received by the bankrupt under this consignment agreement was not segregated at any time and was intermingled with the bank-

rupt's furniture on display. This furniture bore tags or marks showing by what factory it was made, but bore no mark that it was consigned furniture, or that it was not the property of the bankrupt. The bankrupt kept a separate folder, designated a "consignment folder," in which were invoices for furniture on hand or shipped to the bankrupt under the [180] so-called "consignment agreements" with each of the petitioners. No disclosures on the books of the bankrupt were made showing that it held any goods under consignment, except that the matter was in a separate folder. Each petitioner carried a consignment account with the bankrupt on its books, and upon receiving a report from the bankrupt of a sale would make a direct charge against the bankrupt therefor.

The bankrupt did not make reports to the petitioners as required in the so-called "consignment agreement." On August 4, 1928, the bankrupt wrote to the Irwin Company enclosing a report of sales, with two notes in payment of the goods sold. No other report or payment was made. The notes were not paid and were held by the Irwin Company after adjudication in bankruptcy.

All goods were sold by the bankrupt, irrespective of consignment, billed under a common bill. The money was deposited by the bankrupt to its general commercial account, from which it paid its operating expenses and other needs, advertising, or changing its location of business.

After the alleged consignment arrangement and

at the time of removal to and opening at its new place of business, advertising announcing the opening was made in the newspapers of bankrupt's furniture, stock, among others, of the manufacture of both petitioners was published, with the financial assistance of both petitioners and other concerns with whom bankrupt dealt. No statement or intimation was made that the furniture was on consignment, and of the test of the advertisement petitioners had knowledge. [180½]

Beginning prior to March 30, 1928, and continuing until after the assignment for the benefit of creditors, the bankrupt discounted and assigned its contracts and accounts receivable to discount companies, and this practice continued after the so-called consignment agreements, all of which was known to the petitioners. The discount companies had no knowledge that the contracts were supposed to represent goods held on consignment.

An assignment was made October 3, 1928, for the benefit of creditors. The assignee sold some of the furniture, acting in the dual capacity as assignee and as agent of the discount companies. The proceeds of the collections on the contracts and the accounts which had been assigned were kept separate, with minor exceptions. After the assignment both petitioners made demand for the return of the furniture claimed by them to be on consignment. This being denied, petition was filed in bankruptcy October 19, 1928. Adjudication was made November 9, following, and W. S. Osborn was elected as Trustee and qualified November 21, 1928.

ROBERT W. IRWIN COMPANY.

The amount of furniture in the bankrupt's bill of sale to the Irwin Company was $14,490.45; the amount of furniture shipped by the Irwin Company to bankrupt subsequent to April 1, 1928, was $15,-409.00; a total of $29,899.45. The Irwin consignment furniture delivered to the Trustee was $18,-739.50 (including furniture in the bill of sale, $8,-391.00, and shipped by the Irwin Company subsequent to April 1, 1928, $10,348.50). The Trustee in Bankruptcy received the [181] contract and accounts receivable representing Irwin's "consignment" goods (including both goods described in the bill of sale and goods shipped subsequent to the so-called "consignment agreement"), $1,725.00. These were not collected prior to bankruptcy. The assignee received payments on the Irwin "consignment" furniture (including furniture described in the bill of sale and that shipped subsequent to the purported consignment agreement), sold prior to the assignment, $425.67, and sold "consignment furniture" (including furniture described in the bill of sale and furniture shipped subsequent to the purported consignment agreement), for which there was collected by the assignee, receiver and trustee, the sum of $2,062.00.

KETCHAM AND ROTHSCHILD.

The first shipments under the consignment agreement were made on April 2 and 7. The amount of furniture included in the bill of sale to this firm was $11,585.25. The amount shipped by it to bank-

rupt subsequent to March 30, 1928, was $7,047.06; total, $18,632.31. The amount of furniture delivered to the trustee in bankruptcy was $9,984.31 (made up of furniture described in the bill of sale, $5,751.75; furniture shipped after March 30, 1928, $4,232.56). The Trustee received contracts and accounts on consignment goods (including those in the bill of sale and consignment) theretofore sold and not collected prior to bankruptcy, $2,021.00. The assignee received consignment furniture (including those described in the bill of sale and subsequently shipped) sold prior to the assignment, $568.75; sold furniture (included in the bill [182] of sale and for which there was collected by the assignee, receiver and trustee), $1,593.50. The assignee turned over to the trustee in cash, $2,935.85. The Trustee in Bankruptcy, under order of the bankruptcy court, sold practically all of the furniture and receivables in his hands for $150,000.00 cash. It was agreed on stipulation, December 5, 1928, between the petitioners and trustee (a) that the sum of $21,785.55 should stand in lieu of the merchandise claimed by the petitioners; (b) that the sum of $9,874.05 shall stand in lieu of the unpaid accounts receivable and proceeds collected by the assignee and claimed by the petitioner at the date of bankruptcy.

At no time subsequent to March 30, 1928, were any of the receivables assigned to either of the petitioners or any collateral or any notes given to the petitioners for any assigned goods.

The Referee concluded, in substance, that the petitioners knew bankrupts were insolvent, and that

it was the intention of all the parties to make the fraudulent concealment of actual sales; that the bills of sale did not transfer the title to the property, nor the "consignment agreements" constitute the merchandise as consigned; and that neither petitioner has any right against any of the funds, except as a general creditor, and not entitled to reclaim any of its so-called "consigned" furniture or the proceeds thereof. [183]

POE, FALKNOR, FALKNOR, & EMORY, for Petitioners.

EGGERMAN & ROSLING, for Trustee.

NETERER, District Judge.—The legal issue involved is: Was the merchandise, cash or accounts in bankrupt's possession after adjudication held as on consignment as to either or both petitioners?

The state insolvency laws are not controlling, in view of sub. (15), section 1, Bankruptcy Act:

> "A person shall be deemed insolvent under the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

No actual fraud is shown within the state insolvency laws.

The Trustee is vested by operation of law with the title of the bankrupt and the rights of its exe-

cution creditors. Sec. 70, Bank'cy Act. In re Butterwick, 130 Fed. 371. And such rights are determined by the local law. Hewitt vs. Berlin Mach. Wks., 194 U. S. 296.

> "No bill of sale for the transfer of personal property shall be valid as against existing creditors, or innocent purchasers, where the property is left in the possession of the vendor, unless the bill of sale be recorded in the Auditor's office of the county in which the property is situated, *within ten days after such sale is made.*" (Italics supplied.) Sec. 5827, Rem. Comp. Stat. of Washington.

A delivered, unrecorded bill of sale is ineffectual as against creditors under section 5827, *supra.* Schloss vs. Stringer, 113 Wash. 229. And a bill of sale, to be effectual as against creditors, must be filed within ten [184] days after the sale is made. Sec. 5827, *supra.* "It does not say within ten days after the bill of sale is delivered." Schloss vs. Stringer, *supra,* at 532.

The so-called consignment agreement (Petitioners' Exhibit No. 1) signed by the bankrupts on March 23, 1928, and delivered to Ketcham & Rothschild, who signed it in Chicago, March 30, and the Irwin Company agreement mailed to the Irwin Company, received March 27 or 28, signed and dated by them April 1, but retained until September 5, when one copy was sent to the bankrupt.

Paragraph 9 of this agreement provides:

> " * * * It is hereby agreed that the title to such goods, and the same is, hereby

transferred and conveyed to said party of the first part (petitioners), and that from and after this date the same shall be delivered as having been delivered to said parties of the second part on consignment and under and subject to all of the terms and conditions of this contract. In consideration of the transfer and conveyance of the title to said goods back to the said party of the first part, that company does hereby cancel the indebtedness of the said party of the second part." (Bankrupt.)

The sale or transfer was made on the 23rd of March and delivered to and executed by the petitioners March 30 and April 1st, respectively. The bill of sale made on August 6, 1928, to Irwin & Company is but evidence of the sale made on the 23d of March, and the bill of sale not having been filed for record, cannot in any event have validity as against creditors, and, by the same token, the bill of sale executed by the bankrupts on the 16th day of April, 1928, and filed for record April 24 following, is evidence only of the transfer made in March, *supra,* and the filing on the 24th of April is ineffective. The fact that an inventory was furnished at a later date is [185] immaterial, since the contract was complete as to the essentials, and the formalities after inventory are immaterial. Granger & Co. vs. Louisville Cornice, Roofing and Heating Co., 116 S. W. 753; Sellers vs. Greer, 50 N. E. 246 (Ill.); McPherson vs. Fargo, 74 N. W. 1057 (S. D.); Harland vs. Logansport, 32 N. E. 930; Johnston vs. Trippe, 33 Fed. 530.

That the contract was completed is emphasized by the invoices from Ketcham & Rothschild dated April 2 and 7, 1928, which show a combined shipment of over $8,000.00. See Phillips vs. Moore, 71 Me. 78; Hosner vs. McDonnell, 114 Wash. 489. After the execution of the agreement the relation of the parties and merchandise was established, and neither had the right to change or give to the agreement its own interpretation. Mooney vs. Daily News Co., 133 N. W. 573 (Minn.); Sturtevant Co. vs. Cumberland D. & Co., 68 Atl. 351; Newhall Land & Farming Co. vs. Hogue Kellogg Co., 204 Pac. 562.

As to the merchandise sold on open account and retransfer attempted, the proof does not show resale.

Is the agreement one of sale or consignment?

As tending to show consignment, bankrupt agreed to insure the merchandise in the name of the manufacturer and sell it at not less than invoiced price, retain commissions on sales above invoiced price, keep itemized records of sales distinct from other sales, and make report at stated times of the consigned goods, giving the selling price, names and addresses of purchasers; if any goods were recalled, bankrupt agreed to crate and place on cars at Seattle. [186]

On the sale side, the merchandise was shipped F. O. B. Factory, invoiced to the bankrupt, and charged provisionally to the consigned account, the bankrupt to pay all freight and carrying charges, insurance premium, and expense of caring for the goods pending sale; if collection is not made,

bankrupt to execute a demand note, collateralized by the assignment of account equal to the amount due, and guarantee the credit of customers, and pay "carrying charge" equal to seven per cent after 90 days of shipment date for unsold merchandise; on termination of contract agreed to buy and keep merchandise at the option of manufacturer and pay 25% every 30 days until paid. It is provided the consigned goods, or the accounts, to be the property of the shipper or manufacturer.

A bailment is differentiated from a sale in that it contemplates no transfer of ownership. Sturm vs. Boker, 150 U. S. 312. An agreed price, a vendor, a vendee, an agreement to sell for the agreed price, and agreement of vendee to buy for and pay the agreed price are essential elements of a contract of sale. These elements are not in the agreement. The power to repossess the specific merchandise is an accident of bailment. In re Columbus Buggy Co., 143 Fed. 859. This right is in the contract. The mere fact that the contract provides that the bankrupt may fix the selling price at not less than invoice and to keep commissions, covering insurance, storage and expenses of keeping, does not constitute sale if there is no obligation of the bankrupt to buy. In re Columbus Buggy Co., *supra;* [187] Franklin vs. Stoughton Wagon Co., 168 Fed. 857; Ludvigh vs. Am. Woolen Co., 231 U. S. 522; see, also, In re Eichengreen, 18 Fed. (2) 101. Nor does the agreement of the bankrupt to guarantee the accounts of purchasers change the relation of consignment to sale. Ludvigh vs. Am. Woolen Co., *supra.* The agreement of the bankrupt to buy the

merchandise at the option of the manufacturer at the termination of the contract does not create a sale, as the parties may make a valid consignment agreement making provision for change, and until the change is effected, the agreement is one of consignment. Mitchell Wagon Co. vs. Poole, 235 Fed. 817. I have no doubt that the intent of the parties was in good faith to ship future merchandise on consignment, no present liability by the bankrupt was made, or right created to petitioner. In re Aronson, 245 Fed. 207. The relation was principal and factor, with the rights of each defined, rather than debtor and creditor. The superadded agreement as to purchase was a condition which had not matured. The petitioners, as the testimony discloses, had confidence in the bankrupts and "felt justified in backing them with merchandise to the extent of their new enterprise." There was no basis for credit, but did have a basis for payment. The contingency not having matured into a fixed status, the merchandise shipped on consignment and delivered to the trustee, should be accounted for by him.

AS TO ACCOUNTS AND CASH.

There is no evidence to show that the money held by the Trustee was received for sale of merchandise [188] held on consignment. The money claimed must be traced to the trust fund. See In re John Deere Plow Co., 137 Fed. 602. There is no evidence that the money in issue was received for the consigned merchandise, and upon report of sale the merchandise was billed to bankrupt as on sale; and

to recover, petitioner must prove his merchandise or money received for it, or trace the merchandise to the account. This has not been done. Zenor vs. McFarlin; In re Lockwood Grain Co., 238 Fed. 725.

The inevitable conclusion is that the merchandise of petitioners manufacture in bankrupt's possession on April 1, 1928, vested in the bankrupt, and that the attempted retransfer to the petitioners was ineffective; that the merchandise shipped subsequent to this date was held on consignment, and that the petitioners are entitled to the proceeds of the sale of such consigned merchandise as passed to the Trustee in bankruptcy. No trust relation has been traced to accounts which came into the possession of the Trustee in bankruptcy, or merchandise sold under consignment. These funds were so commingled with the general funds of the bankrupt that no identity is established.

It would unduly extend this memorandum to apply or distinguish the numerous cases cited by both parties and no good purpose would be served.

The order of the referee is affirmed, except as herein stated.

NETERER,
United States District Judge.

[Endorsed]: Filed Febr. 5, 1931. [189]

[Title of Court and Cause.]

ORDER UPON PETITIONS FOR REVIEW OF ROBERT W. IRWIN COMPANY, A CORPORATION, AND KETCHAM & ROTHSCHILD, INC., A CORPORATION.

This matter having previously and regularly come before this court for hearing upon the petitions of Robert W. Irwin Company, a corporation, and Ketcham & Rothschild, Inc., a corporation, for review of several orders of the Honorable Ben L. Moore, Esquire, Referee in Bankruptcy, entered on May 1st, 1930, said orders denying *in toto* several petitions for reclamation of furniture and merchandise filed by said Robert W. Irwin Company, a corporation, and Ketcham & Rothschild, Inc., a corporation, on or about the 17th day of November, 1928, the said Ben L. Moore, Esquire, as Referee, having duly heretofore certified to this court the testimony and exhibits involved in said petitions for reclamation, together with his conclusions thereupon, and this court having thereafter undertaken to review said orders, as provided by the Bankruptcy Law and General Order XXVII, and thereafter said petitions for review having been argued by counsel for the respective petitioners and by counsel for the Trustee, and thereafter the court being duly advised in the premises, having filed herein its Memorandum Decision concluding that the orders of said Ben L. Moore, Esquire, as Referee, so sought to be reviewed, were in certain respects incorrect. [190]

Now, Therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the consignment agreements executed by and between the above-named bankrupt, Renfro-Wadenstein, a corporation, and petitioners, Robert W. Irwin Company, a corporation, and Ketcham & Rothschild, Inc., a corporation, are and were, as respects all merchandise subsequently consigned thereunder, valid agreements of consignment, and that the petitioner, Robert W. Irwin Company, a corporation, is entitled to recover from Walter S. Osborn, as Trustee of the estate of the above-named bankrupt, and the said Trustee is hereby directed to pay to said claim, $7,243.95, being 70% of the invoice price of the furniture shipped by said petitioner, Robert W. Irwin Company, a corporation, to said bankrupt subsequent to the execution of the consignment agreement, coming into the hands of the Trustee in Bankruptcy, the invoice price of said consigned furniture being in the sum of $10,-348.50; and that the petitioner, Ketcham & Rothschild, Inc., a corporation, is entitled to recover from Walter S. Osborne, as Trustee of the estate of the above-named bankrupt, and the said Trustee is hereby directed to pay said claimant, the sum of $2,962.79, being 70% of the invoice price of the furniture consigned by said petitioner to said bankrupt subsequent to the execution of said consignment agreement, coming into the hands of the Trustee in Bankruptcy, the total invoice price of said consigned goods being $4,232.56. [191]

The proceeds of the sale of the furniture so

awarded petitioners having been placed on deposit drawing interest at the rate of 3% per annum from April 12, 1929, said petitioners are allowed interest on the award made them in this paragraph at the rate of 3% per annum from the 12th day of April, 1929, to date, and said Trustee is hereby directed to pay said petitioners said interest, in addition to the awards above made said petitioners.

2. Leave is hereby given petitioners to file in this matter their respective general claims for the furniture delivered by them to bankrupt other than that hereinabove specifically decreed to be their property.

3. The consignment agreements above referred to providing for the payment of a 7% carrying charge for a period beginning ninety days after the shipment of said furniture and during the period said merchandise remained in said bankrupt's hands, said petitioners are hereby awarded, in addition to the sums set forth in Paragraph 1, a carrying charge, as provided in said contract on the invoice value of the furniture shipped to the bankrupt subsequent to the execution of the consignment agreements for a period beginning ninety days after the shipment of said furniture and ending on the date of the filing of the petition in bankruptcy, this award to constitute a general claim.

4. In all other respects the Referee's orders are hereby confirmed.

5. No costs allowed to either party.

6. Both the Trustee and petitioners are hereby allowed exceptions to that portion of this order

Now, Therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the consignment agreements executed by and between the above-named bankrupt, Renfro-Wadenstein, a corporation, and petitioners, Robert W. Irwin Company, a corporation, and Ketcham & Rothschild, Inc., a corporation, are and were, as respects all merchandise subsequently consigned thereunder, valid agreements of consignment, and that the petitioner, Robert W. Irwin Company, a corporation, is entitled to recover from Walter S. Osborn, as Trustee of the estate of the above-named bankrupt, and the said Trustee is hereby directed to pay to said claim, $7,243.95, being 70% of the invoice price of the furniture shipped by said petitioner, Robert W. Irwin Company, a corporation, to said bankrupt subsequent to the execution of the consignment agreement, coming into the hands of the Trustee in Bankruptcy, the invoice price of said consigned furniture being in the sum of $10,-348.50; and that the petitioner, Ketcham & Rothschild, Inc., a corporation, is entitled to recover from Walter S. Osborne, as Trustee of the estate of the above-named bankrupt, and the said Trustee is hereby directed to pay said claimant, the sum of $2,962.79, being 70% of the invoice price of the furniture consigned by said petitioner to said bankrupt subsequent to the execution of said consignment agreement, coming into the hands of the Trustee in Bankruptcy, the total invoice price of said consigned goods being $4,232.56. [191]

The proceeds of the sale of the furniture so

awarded petitioners having been placed on deposit drawing interest at the rate of 3% per annum from April 12, 1929, said petitioners are allowed interest on the award made them in this paragraph at the rate of 3% per annum from the 12th day of April, 1929, to date, and said Trustee is hereby directed to pay said petitioners said interest, in addition to the awards above made said petitioners.

2. Leave is hereby given petitioners to file in this matter their respective general claims for the furniture delivered by them to bankrupt other than that hereinabove specifically decreed to be their property.

3. The consignment agreements above referred to providing for the payment of a 7% carrying charge for a period beginning ninety days after the shipment of said furniture and during the period said merchandise remained in said bankrupt's hands, said petitioners are hereby awarded, in addition to the sums set forth in Paragraph 1, a carrying charge, as provided in said contract on the invoice value of the furniture shipped to the bankrupt subsequent to the execution of the consignment agreements for a period beginning ninety days after the shipment of said furniture and ending on the date of the filing of the petition in bankruptcy, this award to constitute a general claim.

4. In all other respects the Referee's orders are hereby confirmed.

5. No costs allowed to either party.

6. Both the Trustee and petitioners are hereby allowed exceptions to that portion of this order

adverse to them, and the petitioners are further allowed an exception to the Court's refusal to sign their proposed order upon petitions for review of Robert W. Irwin Company, a corporation, and Ketcham & Rothschild, Inc., a corporation, heretofore filed in this cause. [192]

Dated this 1st day of May, 1931.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed May 1, 1931. [193]

[Title of Court and Cause.]

ORDER UPON PETITIONS FOR REVIEW OF ROBERT W. IRWIN COMPANY, A CORPORATION, AND KETCHAM & ROTHSCHILD, INC., A CORPORATION.

This matter having previously and regularly come before this court for hearing upon the petition of Robert W. Irwin Company, a corporation, and Ketcham & Rothschild, Inc., a corporation, for review of several orders of the Honorable Ben L. Moore, Esquire, Referee in Bankruptcy, entered on May 1st, 1930, said orders denying *in toto* several petitions for reclamation of furniture and merchandise filed by said Robert W. Irwin Company, a corporation, and Ketcham & Rothschild, Inc., a corporation, on or about the 17th day of November, 1928, the said Ben. L. Moore, Esquire, as Referee, having duly heretofore certified to this court the testimony and

exhibits involved in said petitions for reclamation, together with his conclusions thereupon, and this court having thereafter undertaken to review said orders, as provided by the Bankruptcy Law and General Order XXVII, and thereafter said petitions for review having been argued by counsel for the respective petitioners and by counsel for the Trustee, and thereafter the court being duly advised in the premises, having filed herein its memorandum decision concluding that the orders of said Ben. L. Moore, Esquire, as Referee, so sought to be reviewed, were in certain respects incorrect,—

Now, Therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the consignment agreements executed by and between the above-named bankrupt, Renfrew-Wadenstein, a corporation, and petitioners, Robert W. Irwin Company, a corporation, and Ketcham & Rothschild, Inc., a corporation, are [194] and were, as respects all merchandise subsequently consigned thereunder, valid agreements of consignment, and that the petitioner, Robert W. Irwin Company, a corporation, is entitled to recover from Walter S. Osborne, as Trustee of the estate of the above-named bankrupt, and the said Trustee is hereby directed to pay to said claimant, $7,243.95, being 70% of the invoice price of the furniture shipped by said petitioner, Robert W. Irwin Company, a corporation, to said bankrupt subsequent to the execution of the consignment agreement, coming into the hands of the Trustee in Bankruptcy, the invoice price of said consigned furniture being in the sum of $10,348.50; and that the petitioner, Ketcham & Roth-

schild, Inc., a corporation, is entitled to recover from Walter S. Osborne, as Trustee of the estate of the above-named bankrupt, and the said Trustee is hereby directed to pay said claimant, the sum of $2,-962.79, being 70% of the invoice price of the furniture consigned by said petitioner to said bankrupt subsequent to the execution of said consignment agreement, coming into the hands of the Trustee in Bankruptcy, the total invoice price of said consigned goods being *$4,23256.* Said petitioners are allowed interest on the award made them in this paragraph at the rate of 4% per annum from the date of the Trustee's sale in December, 1928, until paid.

2. As respects the furniture and merchandise delivered by petitioners, Robert W. Irwin Company, a corporation, and Ketcham & Rothschild, Inc., a corporation, to the above-named bankrupt other than that consigned to said bankrupt by said petitioners subsequent to the execution of said consignment agreement, and coming into the hands of the Trustee in Bankruptcy, said petitioners have established and they are hereby awarded, general claims against the estate of said bankrupt equal to the sum total of the invoiced value of said furniture and merchandise as follows: [195] Robert W. Irwin Company, a corporation, the sum of $19,195.95; Ketcham & Rothschild, Inc., a corporation, the sum of $11,853.44. The general claim of Robert W. Irwin Company, hereinabove allowed, is not inclusive of or affected by the claim of Robert W. Irwin Company filed herein on May 29th 1929, in the sum of $1,-215.91, said claim not being among the items included in the matters litigated herein.

3. The consignment agreements above referred to (Par. 6) providing for the payment of a 7% carrying charge for a period beginning ninety days after the shipment of said furniture and during the period the merchandise remained in said bankrupt's hands, said petitioners are hereby awarded, in addition to the sums set forth in paragraphs numbered 1 and 2 hereof, interest as provided in said contract for said period to date of the filing of the petition in bankruptcy herein, this award to constitute a general claim.

4. In all other respects the Referee's orders are hereby confirmed.

5. Costs in the sum of $——— are hereby awarded to the petitioners, Robert W. Irwin Company, a corporation, and Ketcham & Rothschild, Inc., a corporation.

6. Both the Trustee and petitioners are hereby allowed exceptions to that portion of this order adverse to them.

Dated that —— day of April, 1931.

———————————,

Judge.

[Endorsed]: Filed May 1, 1931. [196]

———

[Title of Court and Cause.]

COST BILL OF TRUSTEE W. S. OSBORN IN RECLAMATION PROCEEDINGS OF IRWIN & CO. AND KETCHAM & ROTHSCHILD.

The Trustee, W. S. Osborn, has incurred the

following expenditures and made the following disbursements in connection with the above reclamation proceedings:

1. To Raymond Trainor, Court Reporter, Trustee's share of charges for reporting of reclamation proceedings paid by Trustee's check in the following amounts:

No. 7	$ 11.25
No. 41	75.00
No. 292	45.00

2. To Raymond Trainor, Court Reporter, Trustee's share of the expense of transcript on petition for review:

No. 627	223.30

3. To Hills Auditing Co., on account of inventories, preparation of audit and reconciliation of Hills audit with audit of Smith, Robertson & *b* Co., payment by Trustee's checks in the following amounts:

No. 34, A. W. Hoffman	105.00
No. 35, S. T. Hills	75.00
No. 6, S. T. Hills Auditing Co.	180.00
No. 294, S. T. Hills Auditing Co.	75.00

4. To Bausman, Oldham & Eggerman, check No. 632 for payment of reporter's fee in reclamation proceedings 8.00

Total.....$797.55

EGGERMAN & ROSLING,
Attorneys for Trustee.

United States of America,
Western District of Washington,
Northern Division,—ss.

W. S. Greathouse, being first duly sworn, upon his oath deposes and says: That he is one of the attorneys for the Trustee, W. S. Osborn, in the above-entitled cause; [197] that he has read the foregoing cost bill and that the items therein contained are correct; that such disbursements have been necessarily incurred in this action by the Trustee and the services charged therein have been actually and necessarily performed as therein stated.

H. S. GREATHOUSE.

Subscribed and sworn to before me this 30th day of April, 1931.

[Notarial Seal] EDWARD F. STERN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Due service of the foregoing cost bill of Trustee W. S. Osborn, together with receipt of copy thereof, is hereby acknowledged this 30 day of April, 1931.

_____,
Attorney for Robert W. Irwin & Co. and Ketcham & Rothschild.

To Robert W. Irwin & Co. and Ketcham & Rothschild, Inc., and to Poe, Falknor, Falknor & Emory, Your Attorneys:

Please take notice that the above cost bill will be presented to the court for the purpose of taxa-

tion of costs on Friday, May 1, 1931, or at such other time as counsel may agree.

EGGERMAN & ROSLING,
Attorneys for Trustee.

Copy of within received April 30, 1931.
POE, FALKNOR, FALKNOR & EMORY,
Attys. for ————.

[Endorsed]: May 1, 1931. [198]

[Title of Court and Cause.]

COST BILL OF PETITIONERS, ROBERT W. IRWIN COMPANY, A CORPORATION, AND KETCHAM & ROTHSCHILD, INC., A CORPORATION.

S. T. Hills, taking and checking stock ....$	15.00
Smith, Robertson & Co., analyzing disposition of merchandise consigned	325.00
Raymond Trainor, services 12/6/28 to 3/26/29	103.85
Samuel T. Racine	10.00
Smith Robertson & Co., 3/29	100.00
Raymond Trainor (court reporter)	142.60
Raymond Trainor (court reporter)	67.60
Raymond Trainor (court reporter)	179.87
Certified copy of bill of sale	2.20
U. S. Marshall	8.56
Serving subpoena	1.40
Copy Company, taking photographs	40.78
Telegrams	40.78
Total .....$	1,011.16

[199]

United States of America,
Western District of Washington,
Northern Division,—ss.

DeWolfe, Emory, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for the petitioners, Robert W. Irwin Company, a corporation, and Ketcham & Rothschild, Inc., a corporation, in the above-entitled cause, and that the above and foregoing statement of costs and disbursements, exclusive of the statutory attorney's fee, is true and correct and that the said amounts have been actually disbursed in said action.

DeWOLFE EMORY.

Subscribed and sworn to before me this 15th day of April, 1931.

[Notary Seal] DRAYTON F. HOWE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Due service of the foregoing cost bill of petitioners, Robert W. Irwin Company, a corporation, and Ketcham & Rothschild, Inc., a corporation, together with the receipt of a true copy thereof, is hereby acknowledged this 15th day of April, 1931.

_____,
Trustee in Bankruptcy.

[Endorsed]: Filed May 1, 1931. [200]

[Title of Court and Cause.]

PETITION FOR APPEAL OF ROBERT W. IRWIN COMPANY.

To the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the Western District of Washington, Northern Division:

1. Heretofore in the above-styled matter your petitioner, Robert W. Irwin Company, a corporation, filed its petition for the reclamation of certain furniture, accounts receivable and proceeds of the sale of said furniture and collections made upon said accounts receivable, which said petition in reclamation was thereafter heard by Ben L. Moore, Esquire, as Referee in Bankruptcy, and was thereafter denied *in toto.*

That thereafter your petitioner sought and obtained a review by the above-styled court of said Referee's order so denying its petition in reclamation and said Referee's order was by said court in part reversed and in part affirmed by an order entered in the above-styled matter by the Honorable Jeremiah Neterer, one of the Judges of the above-entitled court on the 1st day of May, 1931, which said order is styled "Order upon Petitions for Review of Robert W. Irwin Company, a corporation, and Ketcham—Rothschild, Inc., a corporation" and which said order is a final judgment or order upon said petition in reclamation of your

petitioner, Robert W. Irwin Company, a corporation.

2. That the final order referred to in the paragraph next preceding this was entered upon a controversy arising in bankruptcy proceedings, which said bankruptcy controversy and proceedings and order so entered on them involved the allowance and rejection of a debt or claim of $500.00 or over within the purview of Sections 24 and 25 of the Bankruptcy Act as Amended May 28th, 1926.

3. Your petitioner, Robert W. Irwin Company, considering [201] itself aggrieved by that portion of the order of the above-styled court entered on May 1st, 1931, denying in part the relief prayed for in its petition in reclamation herein, and relying upon General Order in Bankruptcy No. XXXVI and the applicable statutes, does hereby appeal from said order, and each and every part thereof, denying the relief prayed for in said petition in reclamation to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order in part denying said petition in reclamation of your petitioner was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE, your petitioner prays for the allowance of an appeal to the Circuit Court of Appeals for the Ninth Circuit, with a direction as to

the amount of the cost bond to be fixed upon said appeal.

Dated at Seattle, Washington, this 25 day of May, 1931.

DeWOLFE EMORY,
POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Petitioner Robert W. Irwin Company, a Corporation.

Due service of the foregoing petition for appeal of Robert W. Irwin Company, together with the receipt of a true copy thereof, is hereby acknowledged this 25 day of May, 1931.

EGGERMAN & ROSLING,
Attorneys for Trustee.

[Endorsed]: Filed May 25, 1931. [202]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS OF PETITIONER, ROBERT W. IRWIN COMPANY, A CORPORATION.

Comes now Robert W. Irwin Company, a corporation, petitioner in reclamation and appellant herein, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause from the final order affirming in part and denying in part the relief prayed for in the petition for reclamation of said petitioner, said order being entered in the above-styled matter by the above-styled court on the 1st day of May, 1931, said appeal being prosecuted

to the United States Circuit Court of Appeals for the Ninth Circuit:

1. The Court erred in failing to grant in it entirety the petition of reclamation of Robert W. Irwin Company, a corporation.

2. The Court erred in holding that the bill of sale from Renfro-Wadenstein to Robert W. Irwin Company, a corporation, dated August 6th, 1928, did not effectively pass title to the merchandise therein described to the petitioner, Robert W. Irwin Company, a corporation.

3. The Court erred in ruling that the bill of sale from Renfro-Wadenstein to Robert W. Irwin Company, a corporation, dated August 6th, 1928, was invalid.

4. The Court erred in failing to hold that there was a sufficient transfer of the merchandise described in the bill of sale of August 6th, 1928, from the possession of [203] Renfro-Wadenstein as owner to Renfro-Wadenstein as bailee, for petitioner to take the case out of the statute requiring recording of bills of sale.

5. The Court erred in failing to find that Renfro-Wadenstein was solvent at the time of executing the consignment contract and at the time of executing the bill of sale.

6. The Court erred in failing to find that the bill of sale of August 6th, 1928, was not a preference but was executed for a present valid consideration.

7. The Court erred in failing to find that the petitioner, Robert W. Irwin Company, a corpora-

tion, was entitled to the immediate possession of all accounts receivable in the hands of the Trustee which were unpaid by customers of Renfro-Wadenstein, said accounts receivable representing furniture sold, both by Renfro-Wadenstein and by S. T. Hill as assignee, said furniture being covered both by said bill of sale and by said consignment agreement.

8. The Court erred in failing to find and order that the petitioner, Robert W. Irwin Company, a corporation, was entitled to the immediate possession of certain sums of money collected by Renfro-Wadenstein and by S. T. Hill as assignee, said moneys being collections on account, representing furniture sold, said furniture being covered both by said bill of sale and by said consignment agreement.

9. The Court erred in finding that the contracts and accounts receivable of Renfro-Wadenstein owned by petitioner were negotiated to discount companies by Renfro-Wadenstein with the knowledge of petitioner.

10. The Court erred in refusing to allow petitioner its costs and attorneys' fees as prayed for. [204]

WHEREFORE, Robert W. Irwin Company, a corporation, petitioner and appellant, prays that said order entered in this cause on the 1st day of May, 1931, upon its petition for review of the Referee's order may be reversed, and for such other and further relief as to the Court may seem just and proper.

Dated at Seattle, Washington, this 25th day of May, 1931.

DeWOLFE EMORY,
POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Petitioner and Appellant, Robert W. Irwin Company, a Corporation.

Due service of the foregoing assignment of errors of petitioner, Robert W. Irwin Company, a corporation, together with the receipt of a true copy thereof, is hereby acknowledged this 25th day of May, 1931.

EGGERMAN & ROSLING,
Attorneys for Trustee.

[Endorsed]: Filed May 25, 1931. [205]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The petition of Robert W. Irwin, a corporation, petitioner in reclamation proceedings in the above matter, for an appeal from the final order denying in part and granting in part said petition in reclamation, entered in this cause on the 1st day of May, 1931, to the Circuit Court of Appeals for the Ninth Circuit, is hereby granted and the appeal is allowed.

Said petitioner's cost bond on said appeal is hereby fixed in the sum of $250.

Done in open court this 25th day of May, 1931.

BOURQUIN,
District Judge.

[Endorsed]: Filed May 25, 1931. [206]

[Title of Court and Cause.]

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Robert W. Irwin Company, a corporation, as Principal, and American Bonding Co. of Baltimore, as surety, are held and firmly bound unto Walter S. Osborn, as Trustee in Bankruptcy of Renfro-Wadenstein, a corporation, and Renfro-Wadenstein Furniture Co., a corporation, bankrupts, in the sum of Two Hundred and Fifty and no/100 Dollars ($250.00), to be paid to the said Walter S. Osborn as Trustee in Bankruptcy of Renfro-Wadenstein, a corporation, and Renfro-Wadenstein Furniture Co., a corporation, bankrupts, his successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

SEALED with our seals and dated this 25 day of May, 1931.

WHEREAS lately, in the May term of the United States District Court for the Western District of Washington, Northern Division, in a certain matter styled as aforesaid, an order was rendered styled "Order upon Petitions for Review of Robert W. Irwin Company, a corporation, and

Ketcham & Rothschild, Inc., a corporation" against the said Robert W. Irwin Company, a corporation, and the said Robert W. Irwin Company, a corporation, has petitioned for and [207] been allowed by said United States District Court for the District and Division aforesaid on appeal to the United States Circuit Court of Appeals for the Ninth Circuit and a citation has been issued directed to the said Walter S. Osborn, citing him to appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from and after the date of said citation,

NOW, THE CONDITION OF THE ABOVE OBLIGATION is such that if the said Robert W. Irwin Company, a corporation, shall prosecute said appeal to effect and pay all costs if it fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

Dated at Seattle, Washington, this 25th day of May, 1931.

ROBERT W. IRWIN COMPANY, a Corporation.

By POE, FALKNOR, FALKNOR & EMORY,

As Its Attorneys,

Principal.

AMERICAN BONDING COMPANY OF BALTIMORE.

[Seal—Amer. Bonding Co.]

By W. L. GOZZAM,

Attorney-in-fact,

Surety.

Approved by

BOURQUIN,
District Judge.

[Endorsed]: Filed May 25, 1931. [207½]

[Title of Court and Cause.]

PETITION FOR APPEAL OF KETCHAM & ROTHSCHILD, INC.

To the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the Western District of Washington, Northern Division:

1. Heretofore in the above styled matter your petitioner, Ketcham & Rothschild, Inc., a corporation, filed its petition for the reclamation of certain furniture, accounts receivable and proceeds of the sale of said furniture and collections made upon said accounts receivable, which said petition in reclamation was thereafter heard by Ben L. Moore, Esquire, as Referee in Bankruptcy, and was thereafter denied *in toto*.

That thereafter your petitioner sought and obtained a review by the above styled court of said Referee's order so denying its petition in reclamation and said Referee's order was by said court in part reversed and in part affirmed by an order entered in the above styled matter by the Honorable Jeremiah Neterer, one of the Judges of the above-entitled court on the 1st day of May, 1931, which said order is styled "Order Upon Petitions for Review of Robert W. Irwin Company, a cor-

poration, and Ketcham & Rothschild, Inc., a corporation," and which said order is a final judgment or order upon said petition in reclamation of your petitioner, Ketcham & Rothschild, Inc., a corporation.

2. That the final order referred to in the paragraph next preceding this was entered upon a controversy arising [208] in bankruptcy proceedings, which said bankruptcy controversy and proceedings and order so entered on them involved the allowance and rejection of a debt or claim of $500.00 or over within the purview of Sections 24 and 25 of the Bankruptcy Act as Amended May 28th, 1926.

3. Your petitioner, Ketcham & Rothschild, Inc., considering itself aggrieved by that portion of the order of the above styled court entered on May 1st, 1931, denying in part the relief prayed for in its petition in reclamation herein, and relying upon General Order in Bankruptcy No. XXXVI and the applicable statutes, does hereby appeal from said order, and each and every part thereof, denying the relief prayed for in said petition in reclamation to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order in part denying said petition in reclamation of your petitioner was made, duly authenticated, may be sent to the United

States Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE, your petitioner prays for the allowance of an appeal to the Circuit Court of Appeals for the Ninth Circuit, with a direction as to the amount of the cost bond to be fixed upon said appeal.

Dated at Seattle, Washington, this 25 day of May, 1931.

DeWOLFE EMORY,
POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Petitioner, Ketcham & Rothschild, Inc., a Corporation. [209]

Due service of the foregoing petition for appeal of Ketcham & Rothschild, Inc., together with the receipt of a true copy thereof, is hereby acknowledged this 25 day of May, 1931.

EGGERMAN & ROSLING,
Attorneys for Trustee.

[Endorsed]: Filed May 25, 1931. [210]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS OF PETITIONER, KETCHAM & ROTHSCHILD, INC., A CORPORATION.

Comes now Ketcham & Rothschild, Inc., a corporation, petitioner in reclamation and appellant herein, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause from

the final order affirming in part and denying in part the relief prayed for in the petition for reclamation of said petitioner, said order being entered in the above styled matter by the above styled court on the 1st day of May, 1931, said appeal being prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit:

1. The Court erred in failing to grant in its entirety the petition of reclamation of Ketcham & Rothschild, Inc., a corporation.

2. The Court erred in holding and finding that the sale of the merchandise included in the bill of sale to petitioner, Ketcham & Rothschild, Inc., executed April 16, 1928, was completed on the date of the execution of the consignment agreement.

3. The Court erred in holding that the bill of sale to Ketcham & Rothschild, Inc., from the bankrupt, executed April 16, 1928, was not timely recorded under Remington's Compiled Statutes, sec. 5827.

4. The Court erred in failing to find that petitioner was entitled to the merchandise described and set forth in [211] the bill of sale executed April 16, 1928.

5. The Court erred in failing to find that said bill of sale was executed for a present and valid consideration and as such did not constitute a preference.

6. The Court erred in failing to find that said bankrupt was at no time insolvent.

7. The Court erred in failing to find and order that petitioner, Ketcham & Rothschild, Inc., a cor-

poration, was entitled to the immediate possession of the cash and moneys, being the proceeds of the sale of certain furniture sold by the bankrupt and by S. T. Hills Company as assignee, which said furniture was covered by the consignment agreement and the bill of sale, which moneys were in the possession of the Trustee at the time of the filing of the petition in reclamation.

8. The Court erred in finding that the contracts and accounts receivable of Renfro-Wadenstein owned by petitioner were negotiated to discount corporations by Renfro-Wadenstein with the knowledge of petitioner.

9. The Court erred in failing to find that the petitioner, Ketcham & Rothschild, Inc., a corporation, was entitled to the immediate possession of all accounts receivable in the hands of the Trustee which were unpaid by the customers of Renfro-Wadenstein, said accounts receivable being collected by Renfro-Wadenstein and S. T. Hills Company, being covered both by said Bill of Sale and by said consignment agreement.

10. The Court erred in refusing to allow petitioner its costs and attorneys' fees as prayed for. [212]

WHEREFORE, Ketcham & Rothschild, Inc., a corporation, petitioner and appellant, prays that said order entered in this cause on the 1st day of May, 1931, upon its petition for review of the Referee's order may be reversed, and for such other and further relief as to the Court may seem just and proper.

Dated at Seattle, Washington, this 25 day of May, 1931.

DeWOLFE EMORY,
POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Petitioner and Appellant, Ketcham & Rothschild, Inc., a Corporation.

Due service of the foregoing assignment of errors of petitioner, Ketcham & Rothschild, Inc., a corporation, together with the receipt of a true copy thereof, is hereby acknowledged this 25 day of May, 1931.

EGGERMAN & ROSLING,
Attorneys for Trustee.

[Endorsed]: Filed May 25, 1931. [213]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The petition of Ketcham & Rothschild, Inc., a corporation, petitioner in reclamation proceedings in the above matter, for an appeal from the final order denying in part and granting in part said petition in reclamation, entered in this cause on the 1st day of May, 1931, to the Circuit Court of Appeals for the Ninth Circuit, is hereby granted and the appeal is allowed.

Said petitioner's cost bond on said appeal is hereby fixed in the sum of $250.00.

Done in open court this 25 day of May, 1931.

BOURQUIN,
District Judge.

[Endorsed]: Filed May 25, 1931. [214]

[Title of Court and Cause.]

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Ketcham & Rothschild, Inc., a corporation, as principal, and American Bonding Co. of Baltimore, as surety, are held and firmly bound unto Walter S. Osborn, as Trustee in Bankruptcy of Renfro-Wadenstein, a corporation, and Renfro-Wadenstein Furniture Co., a corporation, bankrupts, in the sum of Two Hundred Fifty and No/100 Dollars ($250.00), to be paid to the said Walter S. Osborn as Trustee in Bankruptcy of Renfro-Wadenstein, a corporation, and Renfro-Wadenstein Furniture Co., a corporation, bankrupts, his successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

SEALED with our seals and dated this 25 day of May, 1931.

WHEREAS lately, in the May term of the United States District Court for the Western District of Washington, Northern Division, in a certain matter styled as aforesaid, an order was rendered styled "Order upon Petitions for Review of Robert W. Irwin Company, a corporation, and Ketcham

& Rothschild, Inc., a corporation," against the said Ketcham & Rothschild, Inc., a corporation, and the said Ketcham & Rothschild, Inc., a corporation, has petitioned for and been allowed by said United States District Court for the [215] District and Division aforesaid an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and a citation has been issued directed to the said Walter S. Osborn, citing him to appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from and after the date of said citation.

NOW, THE CONDITION OF THE ABOVE OBLIGATION is such that if the said Ketcham & Rothschild, Inc., a corporation, shall prosecute said appeal to effect and pay all costs if it fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

Dated at Seattle, Washington, this 25 day of May, 1931.

KETCHAM & ROTHSCHILD, INC., a Corporation,

By POE, FALKNOR, FALKNOR & EMORY,

As Its Attorneys,

Principal.

AMERICAN BONDING COMPANY OF BALTIMORE,

[Seal American Bonding Co.]

By W. L. GOZZAM,

Attorney-in-fact,

Surety.

Aproved by

BOURQUIN,
District Judge.

[Endorsed]: Filed May 25, 1931. [216]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL TO CIRCUIT COURT OF APPEALS.

To the Honorable GEORGE M. BOURQUIN, District Judge:

W. S. Osborn as the duly qualified and acting trustee of the estate of the above-entitled bankrupts, feeling aggrieved at the portions adverse to him of the order and decree entered by this District Court, Judge Jeremiah Neterer sitting as District Judge, which order was entered after a hearing on review on the petitions of Ketcham & Rothschild, a corporation, and Irwin & Company, a corporation, petitioners, and in so far as said order pertains to the "consignment contracts" in issue and to awards made thereunder, and in so far as said order modifies the order heretofore entered by the Referee in Bankruptcy in this cause, and allows interest on the award, and allows a seven per cent carrying charge on the invoice value of the consigned furniture, and in so far as said order disallows the trustee's costs herein, therefore the trustee does hereby appeal from the portions of the aforesaid order and decree adverse to petitioner trustee as above referred to, such appeal being to the United

States Circuit Court of Appeals for the Ninth Circuit and your petitioner prays that his appeal be allowed, and that citation be issued as provided by law, and that a transcript of the records, proceedings and documents upon which said order was based, duly authenticated, be sent to the United States Circuit Court of Appeals [217] for the Ninth Circuit under the rules of said court in such cases made and provided, and that this appeal be allowed without the requirement of any bond or security of this appellant trustee, under the rules as to appeals by a Trustee, 11 U. S. C. A., Par. 48, 43 Statutes, 936, 941.

W. S. OSBORN,
Trustee, Appellant.
By D. G. EGGERMAN,
EDW. L. ROSLING,
Solicitors for Appellant Trustee.

ORDER ALLOWING APPEAL.

Appeal allowed this 25th day of May, 1931, to W. S. Osborn, Trustee of the estate of the above-entitled bankrupts, without requirement of any bond.

BOURQUIN,
Judge.

Copy received May 25, 1931.
POE, FALUKNOR, FAULKNOR & EMORY,
Attys. for Petitioner.

[Endorsed]: Filed May 25, 1931. [218]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes W. S. Osborn, Trustee in Bankruptcy of the above-named bankrupt, and herewith enters his assignment of errors on appeal from that portion of the judgment of the above-entitled court which judgment was dated May 1, 1931, modifying the decision of the Referee in Bankruptcy herein on the petitions of Ketcham & Roth*c*hild and Irwin & Co. respectively, and assigns error as follows:

1. That the court erred in declaring the contract dated March 30, 1928 signed by Ketcham & Roth*c*hild and Renfro-Wadenstein, bankrupt, a contract of consignment.

2. That the court erred in declaring that the contract between Irwin & Co. and bankrupt, captioned consignment contract, and referred to in Paragraph I of the court's order is a contract of consignment.

3. That the court erred in holding that any furniture of petitioner Ketcham & Roth*c*hild was held under consignment arrangement with the bankrupt.

4. That the court erred in holding that any furniture of petitioner Irwin & Co. was held by the bankrupt under a consignment arrangement.

5. That the court erred in Paragraph I of its order in awarding judgment against the trustee on account of any furniture held by the bankrupt

and shipped by petitioners or [219] either of them to the bankrupt.

6. That the court erred in awarding petitioners or either of them interest on the award made petitioners in Paragraph I of the court's order and computed on the basis of proceeds of the sale of the furniture.

7. That the court erred in Paragraph III of its order in allowing a 7% carrying charge or any carrying charge to petitioners or either of them.

8. That the court erred in failing to allow to the trustee his costs taxable herein.

9. That the court erred in holding that no actual fraud was shown against petitioners within the state insolvency laws or at all.

10. That the court erred in deciding that petitioners acted in good faith in entering into the contracts referred to in Paragraphs I and II of this assignment of errors.

11. That error was committed in admitting into evidence and/or considering the letter dated March 23, 1928, written by Renfro-Wadenstein attached to Irwin's deposition as Exhibit 26 and introduced as a portion of Petitioners' Exhibit 1, for the reason as stated in the objection of the Trustee to its introduction, first that the contract of alleged consignment is from its terms complete and is executed on the date shown thereon, and is the subject of the petition in reclamation specially pleaded and the issues were made up upon the contract and without any modification or attempt at modification by a subsequent letter. That the letter provides that Renfro-Wadenstein will furnish shortly after the

first of the month an inventory of the Irwin Company's merchandise on hand and will also furnish a bill of sale which will act as a transfer back to Ketcham & Rothchild of the merchandise [220] and that any difference in the amount of the account will be taken care of in three equal payments, thirty, sixty and ninety days. That said letter was objected to for the further reason that any letter written by the bankrupt construing or attempting to construe the purport of the alleged consignment contract would be wholly incompetent and would be a construction of one party as to the terms of a written contract.

12. That the referee erred in entering that portion of Finding of Fact No. 7 which recites "(b) a letter (Irwin's Ex. 26) addressed to Robert W. Irwin Co., dated March 23, 1928, referring to said so-called consignment agreement, and particularly to Paragraph IX thereof."

13. That the court erred in entering that portion of Finding of Fact No. 8 conyained in the second paragraph of said finding.

14. That the Referee erred in entering Finding of Fact No. 20.

15. That the referee erred in entering that portion of Finding of Fact No. 43 as follows: "and the letter dated March 23, 1928."

WHEREFORE the Trustee prays for a reversal of the above-mentioned order in so far as adverse to him.

W. S. OSBORN,
Trustee in Bankruptcy of Renfro-Wadenstein, a Corporation, and Renfro-Wadenstein Furniture Co., a Corporation, Bankrupt.
By D. G. EGGERMAN,
EDW. L. ROSLING,
Solicitors for Trustee.

Copy received May 25, 1931.
POE, FAULKNOR, FAULKNOR & EMORY,
Attys. for Petitioners.

[Endorsed]: Filed May 25, 1931. [221]

[Title of Court and Cause.]

STIPULATION AS TO TRUSTEE'S ASSIGNMENT OF ERROR.

In accordance with the stipulation as to statement of evidence on appeal and in which the only summary of objections noted is as to the letter from Renfro-Wadenstein to Ketcham & Rothschild, part of Petitioners' Exhibit 1,—

IT IS HEREBY STIPULATED AND AGREED by and between Poe, Falknor, Falknor & Emory, attorneys for appellants Ketcham & Rothschild and Irwin & Company and Eggerman & Rosling, attorneys for appellant Trustee, that Paragraph II of the trustee's assignment of error be deemed amended to read as follows:

"That error was committed in admitting into evidence and/or considering the letter dated March 23, 1928, signed by Renfro-Wadenstein and introduced as a portion of Petitioners' Exhibit 1 as follows:

March 23, 1928.

'Ketcham & Rothschild, Inc.
330 East Ohio Street,
Chicago, Illinois.

Gentlemen:

Referring to the attached memorandum of agreement:

It is our understanding that we are to furnish, shortly after the first of the month, an inventory of all of your merchandise on hand:

That we also, are to furnish bill of sale which will act as a transfer back to your company of this merchandise, and that any difference in the amount of the account will be taken care of in three (3) equal payments; thirty, sixty and ninety days.

This refers in particular to Paragraph 9. [222]

Yours very truly,
RENFRO–WADENSTEIN.
O. A. WADENSTEIN.

OAW:G'

for the reason as stated in the objection of the trustee to its introduction: First, that the contract of alleged consignment is from its terms complete and is executed on the date shown thereon and is the subject of the petition in reclamation specially pleaded and the

issues were made up upon the contract and without any modification or attempted modification by subsequent letter; and for the further reason that any letter written by the bankrupt construing or attempting to construe the purport of the alleged consignment contract would be wholly incompetent and would be a construction of one party as to the terms of a written contract."

IT IS FURTHER STIPULATED AND AGREED that this stipulation shall be considered a part of the records to be transmitted by the Clerk of the United States District Court for the Western District of Washington, Northern Division, to the United States Circuit Court of Appeals for the Ninth Circuit in this cause.

Dated this 10 day of June, 1931.

POE, FALKNOR, FALKNOR & EMORY,
Solicitors for Ketcham & Rothschild and Irwin & Company.

EGGERMAN & ROSLING,
Solicitors for Trustee.

The above stipulation approved this —— day of June, 1931.

_____,
Judge.

[Endorsed]: Filed Jun. 15, 1931. [223]

[Title of Court and Cause.]

STIPULATION AS TO STATEMENT OF EVIDENCE ON APPEAL.

IT IS HEREBY STIPULATED AND AGREED by and between Poe, Falknor, Falknor & Emory, solicitors for appellants Ketcham & Rothschild, Inc., and Irwin & Company, a corporation, respectively, and Eggerman & Rosling, solicitors for appellant Trustee W. S. Osborn, Esq., that the summary of evidence contained in the certificate on review of the Honorable Ben L. Moore, Referee in Bankruptcy, and on file in this proceeding together with all exhibits thereto attached, shall be considered for the purposes of all appeals herein to the United States Circuit Court of Appeals for the Ninth Circuit, a statement of the evidence in this proceeding.

IT IS HEREBY FURTHER STIPULATED AND AGREED that the following summary of objections made by the Trustee and of testimony heard by the Referee in Bankruptcy concerning such objections may be considered as a part of the summary of evidence herein, subject to the reservation of all rights of appellants or either of them to object to the consideration of such additional testimony and objections by the United States Circuit Court of Appeals.

Petitioners' Exhibit 1 consisted in part of a letter directed to Ketcham & Rothschild and signed by Renfro-Wadenstein which stated as follows:

"Referring to the attached memorandum of agreement, it is our understanding we [224] are

to furnish shortly after the first of the month, an inventory of all of your merchandise on hand; that we also are to furnish a bill of sale which will act as a transfer back to your company of this merchandise and that any difference in the amount of the account will be taken care of in three equal payments, thirty, sixty and ninety days. This refers in particular to Paragraph 9."

This letter was dated March 23, 1928. The testimony and objections relative to the introduction of said letter in evidence were as follows:

(Mr. Rothschild testifying, Mr. Emory examining.)

"Petitioners' Exhibit 1 for identification, purporting to be consignment contract entered into between Ketcham & Rothschild and Renfro-Wadenstein Company on the 30th of March, 1928, and the attached letter constitute an agreement that was entered into between Renfro-Wadenstein and myself for our company, and a similar one for their company, and signed by Mr. Wadenstein. It was given to me on the 23rd of March, 1928.

Mr. EMORY.—We offer this in evidence.

Mr. EGGERMAN.—(On behalf of trustee.) We object if your Honor please, to the attachment of this letter for two reasons:

In the first place, the contract is from its terms complete and is executed on the date shown thereon and is the subject of this petition in intervention, specially pleaded, and the issues are made up upon the contract, and without any modification, or attempted modification, by a subsequent letter, and for the second reason that any letter written by the

bankrupt construing or attempting to construe the purport of this contract would be wholly incompetent.

We have no objection to the contract itself, but we strenuously object to the introduction of any letter of construction by the bankrupt.

Mr. EMORY.—I would like to withdraw that offer for just a minute, your Honor, and make a little more proof with reference to this letter.

You have identified this letter of March 23, 1928, reading as follows? (Mr. Emory reads [225] the letter as set forth above.) I will ask you at whose instance this letter of March 23, was written?

Mr. EGGERMAN.—I object to that as immaterial; the contract is sufficient.

The COURT.—He may answer.

Mr. EGGERMAN.—Exception.

Mr. ROTHSCHILD.—It was at my instigation. I asked for it.

Q. Why did you ask for it?

Mr. EGGERMAN.—Same objection.

The COURT.—Objection overruled.

A. At the advice of counsel. I had submitted a draft of a tentative consignment arrangement to counsel in Seattle and they looked it over carefully, apparently could find no objection to its clauses.

Mr. EGGERMAN.—I object to all of that.

The COURT.—Yes, I don't think that is necessary.

Mr. EMORY.—You may omit about finding no objection.

A. They suggested that in order to make a contract of that nature complete, it would have to have

a provision whereby it would state definitely when they would give us a bill of sale, and how they would pay for any difference that might be occurred, and when I found that omitted in the contract as submitted to me by Mr. Wadenstein, I asked him to cover it in the form of a letter.

Q. With reference to this notation in the letter which states: 'This refers in particular to Paragraph 9,' at whose instance was that put in the letter?

Mr. EGGERMAN.—Same objection.

The COURT.—Objection overruled.

A. That particular line I suggested his putting in.

Q. And why did you suggest that that reference to Paragraph 9 be put in?

Mr. EGGERMAN.—Same objection.

The COURT.—Same ruling. [226]

A. Because Paragraph 9 recited that they would make a bill of sale to us of what merchandise—rather, they would return to us merchandise they had on hand, and I thot it should be made very plain that this bill of sale they were going to give us referred to that particular clause in the contract.

The letter and the contract were signed by Renfro-Wadenstein at the same time. I made a request of Renfro-Wadenstein prior to the time Renfro-Wadenstein gave this letter to me that the matters which are incorporated in this letter be inserted in the agreement. I had given them a memorandum attached to the draft that I wished, which included such provision, but which they did not include in the contract which they submitted to me. The draft I gave them of the agreement which would be agree-

able to us had attached to it a memo of omissions they had apparently made—apparently overlooked in drawing the contract. Mr. Wadenstein stated he had overlooked the memo in drawing the contract (objected to by Mr. Eggerman; objection overruled; exception noted).

Mr. Emory then asked: And the purpose of the letter was what? (This question was objected to by the Trustee.)

Mr. EMORY.—I think we have the right to show the purpose of this letter was to amend this contract.

The COURT.—Well, he certainly covered that by his testimony already.

A. Paragraph 9 of the consignment agreement recites that the party of the second part—that is, bankrupt—now has in his possession certain goods as per attached list. There was no attached list to the consignment agreement. I took this contract back East with me. I did not sign it up here for my firm. There was at no time any inventory of goods attached to this assignment agreement.

Mr. EMORY.—We offer the contract in evidence.

Mr. EGGERMAN.—We reiterate our objection to this letter and ask leave to ask the witness two or three questions.

(Witness questioned by referee: The letter is dated March 23; the date of the contract is March 30. The letter was attached to the contract and has at all times been attached to the contract since.)

(Witness examined by Mr. EGGERMAN.)

A. The contract was signed in my presence and the date was left blank. They actually signed the

contract [227] on March 23. My firm signed it in Chicago the 30th. The words '30th of March, 1928' were inserted in the handwriting of J. W. Rothschild. There is only one consignment contract in this case and that is all I signed and I signed that without any modification, without any reservations. We at all times considered the letter part of the contract. The contract does not bear on its face that it is a complete contract by my firm and the bankrupt.

I did not write a letter to the bankrupt in response to the letter offered in evidence.

(Whereupon the offer was renewed by petitioner; objection was *renewed Trustee;* and the exhibit was admitted as Petitioner's Exhibit 1 in evidence; Trustee requested an exception.)

(The COURT.—I'll let you present any authorities you may have in the argument why it should not be considered.)

Dated this 10 day of June, 1931.

POE, FALKNOR, FALKNOR & EMORY,
Solicitors for Ketcham & Rothschild, Inc., and Irwin & Co.

EGGERMAN & ROSLING,
Solicitors for Trustee.

The above stipulation approved this 26th day of June, 1931.

_____,
Judge.

[Endorsed]: Filed Jun. 15, 1931. [228]

[Title of Court and Cause.]

ORDER FIXING STATEMENT OF EVIDENCE.

It appearing that the parties to the proceedings in which Ketchem & Rothschild and Irwin & Co. are petitioners for reclamation have heretofore entered into a stipulation concerning the statement of evidence herein, and said stipulation having been considered by this Court, and it appearing that the objections of the Trustee to the letter of Renfro-Wadenstein to Ketcham & Rothschild, dated March 23, 1928, were not incorporated in the Referee's Certificate on Review, but that the original abstract of testimony was transmitted with the Certificate on Review to the Clerk of the above-entitled court, and contained the testimony and proceedings as recited in said stipulation,—

NOW, THEREFORE, IT IS HEREBY ORDERED, that the summary of evidence contained in certificate of review of the Hon. Ben L. Moore, Referee in Bankruptcy, be and it is hereby fixed as a statement of evidence on appeal from the order of the above-entitled court to the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 2d day of July, 1931.

JEREMIAH NETERER,
Judge.

OK.—POE, FALKNOR, FALKNOR & EMORY,
For Petitioners.

Presented by:

W. S. GREATHOUSE,
EGGERMAN & ROSLING,

[Endorsed]: Filed Jul. 2, 1931. [229]

[Title of Court and Cause.]

STIPULATION WAIVING SUPERSEDEAS BOND.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned counsel for Walter S. Osborn, Trustee in Bankruptcy of Renfro-Wadenstein, a corporation, and Renfro-Wadenstein Furniture Co., a corporation, bankrupts above named, and Robert W. Irwin Company, a corporation, and Ketcham & Rothschild, Inc., a corporation, petitioners in reclamation herein, all of the parties hereto being appellants to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment entered by the above styled court on the 1st day of May, 1931, upon the petitions in reclamation of said petitioners, that upon said appeals it will not be necessary for either of the parties hereto to execute or file a supersedeas bond and that neither party hereto will enforce the execution of said judgment or any right given any party hereto thereunder until said appeals have been finally determined by said United States Circuit Court of Appeals for the Ninth Circuit and that until said time the moneys not held by said Trustee under stip-

ulation to await the outsome of said petitions in reclamation shall be kept intact by him.

Dated at Seattle, Washington, this 3 day of June, 1931.

EGGERMAN & ROSLING,
Attorneys for Walter S. Osborn, Trustee in Bankruptcy.

POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Ketcham & Rothschild, Inc., a Corporation.

POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Robert W. Irwin Company, a Corporation.

[Endorsed]: Filed Jun. 4, 1931. [230]

[Title of Court and Cause.]

STIPULATION CONSOLIDATING APPEALS AND PROVIDING FOR ONE TRANSCRIPT OF RECORD.

An appeal having been taken by the Trustee of the above-entitled estate, W. S. Osborn, Esq., from the order of Honorable Jeremiah Neterer, District Judge, on the petitions of Ketcham & Rothschild, Inc., and Robert W. Irwin Company, and said petitioners having cross-appealed separately from the aforesaid order, and said reclamation proceedings having been consolidated for hearing heretofore before the Referee in Bankruptcy and before the above-entitled court,—

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between Poe, Falknor, Falknor & Emory, solicitors for petitioners Ketcham & Rothschild, Inc., and Irwin & Company, respectively, and Eggerman & Rosling, solicitors for W. S. Osborn as Trustee of the above-entitled estate, that the cross-appeal of Ketcham & Rothschild and Irwin & Company may be consolidated and heard in conjunction with the appeal of the Trustee herein before the United States Circuit Court of Appeals for the Ninth Circuit.

AND IT IS FURTHER STIPULATED AND AGREED that under Section 1083 of Revised Statutes of the United States (28 U. S. C. A. 864), one transcript of record shall be sufficient on the above-mentioned appeals, and that such record, when prepared from the combined praecipes of appellant and of cross-appellant, without duplication, by the Clerk of the above-entitled court, may be [231] used on all appeals herein mentioned and that appellants and each cross-appellant may be heard thereon in the same manner as if records had been filed in each appeal.

POE, FALKNOR, FALKNOR & EMORY,
Solicitors for Ketcham & Rothschild, Inc., and Robert W. Irwin & Company, Petitioners.

EGGERMAN & ROSLING,
Solicitors for Trustee.

[Endorsed]: Filed Jun. 2, 1931. [232]

[Title of Court and Cause.]

ORDER AUTHORIZING CLERK TO TRANSMIT EXHIBITS.

It appearing that an appeal has been taken by the Trustee of the above-entitled estate from the order entered by the above-entitled court, on the petition of Ketcham and Rothschild, and Irwin & Co., respectively, and that petitioners have cross-appealed from said order, such appeals having been taken to the United States Circuit Court of Appeals for the Ninth Circuit, and it further appearing that the praecipes of the Trustee and of petitioners request the original exhibits, and it appearing that said exhibits are many in number and involve audits which cannot be readily reproduced, and that a transfer of said original exhibits to the Clerk of the United States Circuit of Appeals for the Ninth Circuit is proper under the circumstances,—

Now, therefore, IT IS HEREBY ORDERED that the Clerk of the above-entitled court be and he is hereby authorized to transmit all exhibits introduced before the Referee on hearings upon the petitions of Ketcham & Rothschild, and Renfro-Wadenstein, respectively, which includes Petitioners' 1 to 56, inclusive, together with the exhibits attached to Irwin's deposition, entered as exhibit 55, together with Trustee's Exhibits "A" to "Q," inclusive, to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 26th day of June, 1931.

JEREMIAH NETERER,
Judge.

Presented by:

W. S. GREATHOUSE,
Of EGGERMAN & ROSLING.

[Endorsed]: Filed Jun. 26, 1931. [233]

[Title of Court and Cause.]

PRAECIPE OF ROBERT W. IRWIN COMPANY FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following, and no other, papers and exhibits:

1. Petition for reclamation of Robert W. Irwin Company (filed November 17, 1928, and attached to Referee's certificate), together with exhibits thereto attached.
2. Answer of Trustee to petition for reclamation of Robert W. Irwin Company (filed January 9, 1929, and attached to Referee's Certificate).
3. Reply of Robert W. Irwin Company to answer of Trustee (filed December 19, 1928, and attached to Referee's Certificate).
4. Order of Ben L. Moore, Esquire, as Referee in Bankruptcy on claim of petitioner, Robert

W. Irwin Company (filed May 2, 1930, and attached to Referee's Certificate).

5. Exceptions of Robert W. Irwin Company to findings of Referee (filed May 2, 1930, and attached to Referee's Certificate).
6. Petition of Robert W. Irwin Company for review of Referee's order (filed May 3, 1930, and attached to Referee's Certificate), together with exhibit thereto attached.
7. Stipulation as to merchandise and accounts receivable and proceeds thereof, claimed by Ketcham & Rothschild, Inc., and Robert W. Irwin Company (filed December 5, 1928, and attached to Referee's Certificate). [234]
8. Referee's memorandum decision attached to Referee's Certificate.
9. Referee's certificate on review.
10. Decision of District Court (filed February 5, 1931).
11. Cost bill of petitioners, Robert W. Irwin Company and Ketcham & Rothschild, Inc. (filed May 1, 1931).
12. Order upon petitions for review (filed May 1, 1931, and signed by Jeremiah Neterer, District Judge).
13. Proposed order upon petitions for review (filed without signing May 1st, 1931).
14. Petition for appeal of Robert W. Irwin Company (filed herewith).
15. Order allowing appeal of Robert W. Irwin Company (filed herewith).
16. Citation on appeal of Robert W. Irwin Company (filed herewith).

17. Bond on appeal of Robert W. Irwin Company (filed herewith).
18. This praecipe.
19. Statement of evidence on appeal (hereafter to be filed and settled).
20. Exhibits (original exhibits requested):
    (a) Petitioner's Exhibit 55, being deposition of Robert W. Irwin, and exhibits attached thereto.
    (b) Petitioner's Exhibit 1, being letter of March 23d from Renfro-Wadenstein, and particularly petitioner's exhibits thereto attached, numbered and described as follows:
        (1) Petitioner's Exhibit 26, being letter of March 23, 1928, from Renfro-Wadenstein to Robert W. Irwin Company.
        (2) Petitioner's Exhibit 27, being petition of Robert W. Irwin Company.
        (3) Consignment agreement dated April 1, 1928.
        (4) Petitioner's Exhibit 28 (being bill of sale dated August 6, 1928). [235]
    (c) Petitioner's Exhibit 48, being a statement of merchandise headed "Royal Division."
    (d) Petitioner's Exhibit 50, being Smith, Robertson & Company's report on disposition of merchandise.

(e) Petitioner's Exhibit 51, being balances of accounts receivable containing charges for consigned merchandise.

(f) Petitioner's Exhibit 52, being list of furniture, accounts receivable and proceeds of sale of furniture collected by Trustee claimed by Ketcham & Rothschild and Robert W. Irwin Company.

(g) Petitioner's Exhibit 53, being comparison and reconciliation of inventory of Smith, Robertson & Company and S. T. Hills Company.

(h) Petitioner's Exhibit 54, being balance sheet of Renfro-Wadenstein.

Said transcript to be prepared as required by law and the rules of this court and the Circuit Court of Appeals for the Ninth Circuit and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, on or before the 25 day of June, 1931.

DeWOLFE EMORY,
POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Petitioner and Appellant, Robert W. Irwin Company.

Due service of the foregoing praecipe, together with the receipt of a true copy thereof, is hereby acknowledged this 25 day of May, 1931.

EGGERMAN & ROSLING,
Attorneys for Trustee.

[Endorsed]: Filed May 25, 1931. [236]

[Title of Court and Cause.]

PRAECIPE OF KETCHAM & ROTHSCHILD, INC., FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following, and no other, papers and exhibits:

1. Petition for reclamation of Ketcham & Rothschild, Inc. (filed November 17, 1928, and attached to Referee's Certificate), together with exhibits thereto attached.
2. Answer of Trustee to petition for reclamation of Ketcham & Rothschild, Inc. (filed January 9, 1929, and attached to Referee's Certificate).
3. Reply of Ketcham & Rothschild, Inc., to answer of Trustee (filed December 19, 1928, and attached to Referee's Certificate).
4. Order of Ben L. Moore, Esquire, as Referee in Bankruptcy, on claim of petitioner, Ketcham & Rothschild, Inc., filed May 2, 1930, and attached to Referee's Certificate).
5. Exceptions of Ketcham & Rothschild, Inc., to Findings of Referee (filed May 2, 1930, and attached to Referee's Certificate).

6. Petition of Ketcham & Rothschild, Inc., for review of Referee's Order (filed May 3, 1930, and attached to Referee's Certificate), together with exhibit thereto attached.
7. Stipulation as to merchandise and accounts receivable and proceeds thereof claimed by Ketcham & Rothschild, Inc., and Robert W. Irwin Company (filed December 5, 1928, and attached to Referee's Certificate). [237]
8. Referee's memorandum decision attached to Referee's Certificate.
9. Referee's certificate on review.
10. Decision of District Court (filed February 5, 1931).
11. Cost bill of petitioners, Ketcham & Rothschild, Inc., and Robert W. Irwin Company (filed May 1, 1931).
12. Order upon petitions for review (filed May 1, 1931, and signed by Jeremiah Neterer, District Judge).
13. Proposed order upon petitions for review (filed without signing May 1, 1931).
14. Petition for appeal of Ketcham & Rothschild, Inc. (filed herewith).
15. Order allowing appeal of Ketcham & Rothschild, Inc. (filed herewith).
16. Citation on appeal of Ketcham & Rothschild, Inc. (filed herewith).
17. Bond on appeal of Ketcham & Rothschild, Inc. (filed herewith).
18. This praecipe.

19. Statement of evidence on appeal (hereafter to be filed and settled).
20. Exhibits (original exhibits requested);
    (a) Petitioner's Exhibit 1, being letter of March 23d from Renfro-Wadenstein to Ketcham & Rothschild, Inc.
    (b) Petitioner's Exhibit 2, being consignment agreement dated March 30th, 1928.
    (c) Petitioner's exhibit unnumbered, being bill of sale dated April 16, 1928.
    (d) Petitioner's Exhibit 3, being special account invoices.
    (e) Petitioner's Exhibit 4, being letter from Renfro-Wadenstein to Ketcham & Rothschild, Inc., and attached statements.
    (f) Petitioner's Exhibit 6, being photostatic copy of ledger. [238]
    (g) Petitioner's Exhibit 7, being two photostatic copies of bills receivable ledger.
    (h) Petitioner's Exhibit 9, being photostatic copy of consignment sales ledger.
    (i) Petitioner's Exhibit 10, being photostatic copy of ledger.
    (j) Petitioner's Exhibit 11, being duplicates of original direct charge invoices.
    (k) Petitioner's Exhibit 12, being photostatic copy of special account ledger.
    (l) Petitioner's Exhibits 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38 and 39.
    (m) Petitioner's Exhibit 50, being Smith,

Robertson & Company's report on disposition of merchandise.

(n) Petitioner's Exhibit 51, being balances of accounts receivable containing charges for consigned merchandise.

(o) Petitioner's Exhibit 52, being list of furniture, accounts receivable and proceeds of sale of furniture collected by Trustee, claimed by Ketcham & Rothschild, Inc., and Robert W. Irwin Company.

(p) Petitioner's Exhibit 53, being comparison and reconciliation of inventory of Smith, Robertson & Company and S. T. Hills Company.

(q) Petitioner's Exhibit 54, being balance sheet of Renfro-Wadenstein.

Said transcript to be prepared as required by law and the rules of this Court and the Circuit Court of Appeals for the Ninth Circuit and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, on or before the 25 day of June, 1931.

DeWOLFE EMORY,
POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Petitioner and Appellant, Ketcham & Rothschild, Inc. [239]

Due service of the foregoing praecipe, together with the receipt of a true copy thereof, is hereby acknowledged this 25 day of May, 1931.

EGGERMAN & ROSLING,
Attorneys for Trustee.

[Endorsed]: Filed May 25, 1931. [240]

[Title of Court and Cause.]

PRAECIPE OF TRUSTEE ON APPEAL AND COUNTER-PRAECIPE OF TRUSTEE ON PETITIONER'S CROSS-APPEAL.

To the Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above-entitled proceedings, and to include in such transcript of record the following papers and exhibits (where paper or exhibit is included in petitioner's praecipe on cross-appeal, such will be indicated by a small "c" after the number).

1(c) Petition for reclamation of Ketcham & Rothschild, Inc., together with exhibits thereto attached.

2(c) Answer of Trustee to petition for reclamation of Ketcham & Rothschild, Inc.

3(c) Reply of Ketcham & Rothschild, Inc., to answer of Trustee.

4(c) Petition for reclamation of Robert W. Irwin Company.

5(c) Answer of Trustee to petition for reclamation of Robert W. Irwin Company.

6(c) Reply of Robert W. Irwin Company to answer of Trustee.

7(c) Order of Ben L. Moore, Esq., as Referee in Bankruptcy, denying claim of petitioner Robert W. Irwin Company.

8(c) Order of Ben L. Moore, Esq., as Referee in [241] Bankruptcy, denying claim of petitioner Ketcham & Rothschild, Inc.

9 Exceptions of trustee to findings of Referee.

10(c) Memorandum decision of Ben L. Moore, Esq., Referee in Bankruptcy on the petition of Ketcham & Rothschild, Inc., and Irwin & Company.

11(c) Stipulation as to merchandise, accounts receivable and proceeds thereof, claimed by Ketcham & Rothschild, Inc., and Robert W. Irwin Company.

12(c) Referee's certificate on review including summary of evidence, findings of fact, conclusions of law and questions presented on review.

13(c) Order upon petition for review, filed May 1, 1931, and signed by Honorable Jeremiah Neterer, District Judge, and memorandum decision of Judge Neterer.

14 Cost bill of Trustee.

15 Petition for appeal of W. S. Osborn, Trustee, together with order allowing appeal attached to said petition.

16 Citation on appeal of W. S. Osborn, Trustee, with acknowledgment of service thereon.

17 This praecipe.

18 Statement of evidence on appeal or stipulation as to statement of evidence (whichever is hereafter filed and settled).

19 Stipulation as to consolidation of appeals (to be filed hereafter).

20 Stipulation as to supersedeas (to be filed hereafter).

21 Exhibits (original exhibits requested): (a) Trustee's Exhibit "A," letter of Renfro-Wadenstein to Ketcham & Rothschild, dated March 11, 1927, and letter of Ketcham & Rothschild to Renfro-Wadenstein, dated March 22, 1927;

(b) Trustee's Exhibit "B": Invoices with bills of lading attached, invoice dated 10/20/27, bill of lading dated [242] 10/20/27, invoice dated 10/24/27, bill of lading dated 8/1/28.

(c) Trustee's Exhibit "C": Bill of Ketcham & Rothschild, dated August 1, 1928, and Renfro-Wadenstein's letter to Ketcham & Rothschild of September 12, 1928.

(d) Trustee's Exhibit "D": Statements of Ketcham & Rothschild, dated November 1, 1927, December 1, 1927, January 1, 1928, and February 1, 1928, made to Renfro-Wadenstein.

(e) Trustee's Exhibit "E": Letter of Robert W. Irwin Company to Renfro-Wadenstein dated April 18, 1927.

(f) Trustee's Exhibit "F": Letter of Johnson, Handley, Johnson Company, dated January 25, 1928, to Renfro-Wadenstein.

(g) Trustee's Exhibit "G": Invoice dated May 28, 1928, from Ketcham & Rothschild to Renfro-Wadenstein together with remittance sheet.

(h) Trustee's Exhibit "H": Invoice of July 31, 1928, from Ketcham & Rothschild to Renfro-Wadenstein.

(i) Letter dated August 24, 1928, from Renfro-Wadenstein to Ketcham & Rothschild.

(j) Trustee's Exhibit "J": Letters of Renfro-Wadenstein to Robert W. Irwin Company, dated March 6, 1928, February 13, 1928, and December 30, 1927, respectively.

(k) Trustee's Exhibit "K": Sheet purporting to be report of sales from Renfro-Wadenstein to Irwin Company.

COUNTER-PRAECIPE OF TRUSTEE ON CROSS-APPEAL OF PETITIONERS.

To the Clerk of the Above-entitled Court:

You are hereby requested to add to the transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to a cross-appeal allowed to petitioners, Ketcham & Rothschild and Irwin & Company, in the [243] above-entitled proceedings and to include in such transcript of record the following exhibits:

a. Trustee's Exhibits "K" and "L": Being S. T. Hill's audit.

b. Trustee's Exhibit "M": Part of S. T. Hill's audit.

c. Trustee's Exhibit "N": Part of S. T. Hill's audit and relating to Robert W. Irwin Company merchandise. Trustee's Exhibit "O" and "P," "Reconciliation," part of S. T. Hill's audit.

d. Trustee's Exhibit "Q": Part of S. T. Hill's audit.

You are requested to prepare said transcript as required by law and the rules of this court and the Circuit Court of Appeals for the Ninth Circuit and to have *have* said transcript filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, on or before the 24th day of June, 1931.

EGGERMAN & ROSLING,
D. G. EGGERMAN,
EDW. L. ROSLING,
Solicitors for Trustee, W. S. Osborn.

Due service of the foregoing praecipe and counter-praecipe admitted, and receipt of copy acknowledged this 29th day of May, 1931, on behalf of each of appellees and cross-appellants.

POE, FALKNOR, FALKNOR & EMORY,
Solicitors for Ketcham & Rothschild, Inc., and Robert W. Irwin Company.

[Endorsed]: Filed May 29, 1931. [244]

[Title of Court and Cause.]

SUPPLEMENTAL PRAECIPE OF TRUSTEE ON APPEAL.

To the Clerk of the Above-entitled Court:

Supplementing Trustee's original praecipe on appeal you are hereby requested to include in the transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth

Circuit, in addition to the papers and exhibits requested in the original praecipe, the following:

22. Trustee's assignment of errors.

23. Stipulation amending assignment of errors of trustee.

24. Stipulation as to statement of evidence.

25. District Court's order fixing statement of evidence entered July 2, 1931.

26. Order consolidating appeals and providing for one record.

You are requested to prepare said transcript including the above documents as required by law and the rules of this court and the Circuit Court of Appeals of the Ninth Circuit and to have said transcript filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, on or before the 24th day of July, 1931.

EGGERMAN & ROSLING,
D. E. EGGERMAN,
EDW. L. ROSLING,
Solicitors for Trustee, W. S. Osborn. [245]

Due service of the foregoing supplemental praecipe admitted and receipt of copy acknowledged this 10th day of July, 1931, on behalf of Ketcham & Rothschild and Irwin and Company, respectively.

POE, FALKNOR, FALKNOR & EMORY,
Solicitors for Ketcham & Rothschild and Irwin & Co.

[Endorsed]: Filed Jul. 10, 1931. [246]

[Title of Court and Cause.]

SUPPLEMENTAL PRAECIPE OF PETITIONERS AND CROSS-APPELLANTS, ROBERT W. IRWIN COMPANY AND KETCHAM & ROTHSCHILD, INC.

Come now Robert W. Irwin Company and Ketcham & Rothschild, Inc., petitioners and cross-appellants herein and request that their separate praecipe heretofore filed herein be supplemented by the addition thereto of the following papers and documents.

1. Assignment of errors of Robert W. Irwin Company in appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

2. Assignment of errors of Ketcham & Rothschild, Inc., on appeal to the United States *Circuit of* Appeals for the Ninth Circuit.

Dated at Seattle, Washington, this 13th day of July, 1931.

POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Robert W. Irwin Company and Ketcham & Rothschild, Inc., Petitioners and Cross-appellants.

Due service of the foregoing supplemental praecipe of petitioners and cross-appellants, Robert W. Irwin Company and Ketcham & Rothschild, Inc., together with the receipt of a true copy thereof, is

hereby acknowledged this 13th day of July, 1931.

EGGERMAN & ROSLING,

Attorneys for Walter S. Osborn, as Trustee in Bankruptcy.

[Endorsed]: Filed July 14, 1931. [247]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that this typewritten transcript of record, consisting of pages numbered from No. 1 to No. 247, inclusive, *to a* full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true, and correct statement of all expense, costs, fees and charges incurred in my office by or on behalf

of the appellant and cross-appellants, for making record, certificate or return to the United States Circuit [248] Court of Appeals for the Ninth Circuit in the foregoing cause to wit:

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return 722 folios at 15¢	$108.30
Certificate of Clerk to Transcript of record with seal	.50
Petition for Appeal of Robert W. Irwin Company, a corporation	5.00
Petition for Appeal of Ketchum & Rothschild, Inc., a corporation	5.00
Petition for Appeal of W. S. Osborn, Trustee of the Estate of the Bankrupt	5.00
Certificate of the Clerk to the original exhibits with seal	.50
Total	$124.30

I hereby certify that the above costs for preparing and certifying record, amounting to $124.30 has been paid to me as follows, viz:

By Geo. W. Irwin Company a corporation,	$ 32.33
By Ketcham & Rothschild, Inc., a corporation	32.32
By W. S. Osborn, Trustee of the Estate of the Bankrupt,	59.65
Total	$124.30

I further certify that I attach hereto and transmit the original citation of Robert W. Irwin Com-

pany, a corporation, the original citation of Ketchum & Rothschild Inc., a corporation and the original citation of W. S. Osborn, Trustee of the Estate of the Bankrupt, each of which were issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 17th day of July, 1931.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court, Western District of Washington.

By E. W. Pettit,
Deputy. [249]

[Endorsed]: Filed May 25, 1931.

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
Western District of Washington,
Northern Division,—ss.

To Walter S. Osborn, as Trustee in Bankruptcy for Renfro-Wadenstein, a Corporation, and Renfro-Wadenstein Furniture Co., a Corporation, Bankrupts and Appellees, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allow-

ing an appeal from the District Court of the United States for the Western District of Washington, Northern Division, in a certain matter styled as above, wherein Ketcham & Rothschild, Inc., a corporation, is appellant, and you are appellee, to show cause, if any there be, why said order upon petitions for review of Ketcham & Rothschild, Inc., a corporation, and Robert W. Irwin Company, a corporation, entered in the above styled cause by the above court on May 1st, 1931, rendered against the said Ketcham & Rothschild, Inc., a corporation, should not be corrected and why speedy justice should not be done to the petitioner in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the Western District of Washington, Northern Division, this 25 day of May, 1931, and in the One Hundred Fifty-fifth year of the Independence of the United States of America.

BOURQUIN,
Judge. [250]

Due service of the foregoing citation on appeal, together with the receipt of a true copy thereof, is hereby acknowledged this 25 day of May, 1931.

EGGERMAN & ROSLING,
Attorneys for Trustee. [251]

[Endorsed]: Filed May 25, 1931.

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
Western District of Washington,
Northern Division,—ss.

To Walter S. Osborn, as Trustee in Bankruptcy for Renfro-Wadenstein, a Corporation, and Renfro-Wadenstein Furniture Co., a Corporation, Bankrupts and Appellees, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the Western District of Washington, Northern Division, in a certain matter styled as above, wherein Robert W. Irwin Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why said order upon petitions for review of Robert W. Irwin Company, a corporation, and Ketcham & Rothschild, Inc., a corporation, entered in the above styled cause by the above court on May 1st, 1931, rendered against the said Robert W. Irwin Company, a corporation, should not be corrected and why speedy justice should not be done to the petitioner in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the Western District of Washington, Northern Division, this 25 day of May, 1931, and in the One Hundred Fifty-fifth year of the Independence of the United States of America.

BOURQUIN,
Judge. [252]

Due service of the foregoing citation on appeal, together with the receipt of a true copy thereof, is hereby acknowledged this 25 day of May, 1931.

EGGERMAN & ROSLING,
Attorneys for Trustee. [253]

[Endorsed]: Filed May 25, 1931.

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

To Ketcham & Rothschild, a Corporation, and Irwin & Company, a Corporation, and Poe, Falknor, Falknor & Emory, Their Attorneys, GREETINGS:

You and each of you are hereby notified that in a certain case in bankruptcy in and for the United States District Court for the Western District of Washington, Northern Division, entitled "In the Matter of Renfro-Wadenstein, a corporation, and Renfro-Wadenstein Furniture Company, a corporation, Bankrupts," on the petitions of Ketcham & Rothschild and Irwin & Company for reclamation

of certain furniture, accounts and proceeds wherein Ketcham & Rothschild and Irwin & Company are petitioners, and W. S. Osborn, as the duly qualified and acting Trustee of the estate of the above-entitled bankrupts, is the answering defendant, an appeal has been allotted W. S. Osborn as Trustee of the estate of the above-entitled bankrupts from the portions of the order of the District Court of the United States for the Western District of Washington, Northern Division, which are adverse to the Trustee on the above petitions. You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, thirty days after the date of this citation to show cause, if any there be, why the order and decree [254] appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the Western District of Washington, Northern Division, this 25th day of May, 1931.

BOURQUIN,
Judge.

Due service of the foregoing citation is hereby admitted by the above-named petitioners and each of them by their solicitors of record this 25th day of May, 1931.

POE, FALKNOR, FALKNOR & EMORY,
Solicitors for Petitioners, Ketcham & Rothschild and Irwin & Company. [255]

[Endorsed]: No. 6535. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Renfro-Wadenstein, a Corporation, and Renfro-Wadenstein Furniture Company, a Corporation, Bankrupts. Walter S. Osborn, as Trustee in Bankruptcy for Renfro-Wadenstein, a Corporation, and Renfro-Wadenstein Furniture Company, a Corporation, Bankrupts, Appellant, vs. Ketcham & Rothschild, Inc., a Corporation, and Robert W. Irwin Company, a Corporation, Appellees, and Ketcham & Rothschild, Inc., a Corporation, Cross-Appellant, vs. Walter S. Osborn, as Trustee in Bankruptcy for Renfro-Wadenstein, a Corporation, and Renfro-Wadenstein Furniture Company, a Corporation, Bankrupts, Cross-Appellees, and Robert W. Irwin Company, a Corporation, Cross-Appellant, vs. Walter S. Osborn, as Trustee in Bankruptcy for Renfro-Wadenstein, a Corporation, and Renfro-Wadenstein Furniture Company, a Corporation, Bankrupts, Cross-Appellees. Transcript of Record. Upon Appeal and Cross-Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed July 23, 1931.

PAUL P. O'BRIEN,
Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

By Frank H. Schmid,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6535.

In the Matter of RENFRO-WADENSTEIN and RENFRO-WADENSTEIN FURNITURE COMPANY, Bankrupts.

ORDER RE PRINTING OF EXHIBITS.

It appearing that the parties hereto thru their respective counsel have stipulated that all exhibits on the appeal and on the cross-appeal shall be excluded from the printed record,—

IT IS HEREBY ORDERED that all exhibits, whether on the appeal or on the cross-appeal herein, shall be excluded from the printed record.

Dated: San Francisco, Calif., August 10, 1931.

WM. H. SAWTELLE,
U. S. Circuit Judge.

O. K.—POE, FALKNOR, FALKNOR, & EMORY,
For Cross-Appellants.

O. K.—EGGERMAN & ROSLING,
For Trustee.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6535.

In the Matter of RENFRO-WADENSTEIN and RENFRO-WADENSTEIN FURNITURE COMPANY, Bankrupts.

STIPULATION RE PRINTING OF EXHIBITS.

IT IS HEREBY STIPULATED AND AGREED by and between Poe, Falknor, Falknor & Emory, solicitors for Ketcham & Rothschild, Inc., and Irwin & Company, respectively, and Eggerman & Rosling, solicitors for W. S. Osborn as Trustee of the above-named bankrupts' estate, that all exhibits, whether copied in the records or not, and whether on the appeal or cross-appeal herein, shall be excluded from the printed record on this appeal.

POE, FALKNOR, FALKNOR & EMORY,
Solicitors for Ketcham & Rothschild, Inc., and Irwin & Company.

EGGERMAN & ROSLING,
Solicitors for Trustee.

[Endorsed]: Filed Aug. 10, 1931. Paul P. O'Brien, Clerk.

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WALTER S. OSBORN, as Trustee in Bankruptcy for RENFRO-WADENSTEIN, a Corporation, and RENFRO-WADENSTEIN FURNITURE COMPANY, a Corporation, Bankrupts,

Appellant,

vs.

KETCHAM & ROTHSCHILD, INC., a Corporation, and ROBERT W. IRWIN COMPANY, a Corporation,

Appellees.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Brief of Appellant Trustee

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LIST OF ABBREVIATIONS

E. — Trustee's Assignment of Errors.

Exh. — Exhibit.

Par. — Paragraph.

Tr. — Transcript of Record.

W. D.— Wadenstein's Deposition, Exh. 55.

STATEMENT OF THE CASE

These proceedings were initiated by separate petitions of Ketcham & Rothschild, a corporation, and Irwin & Co., a corporation, respectively, to reclaim (a) certain furniture alleged to have been under consignment with bankrupt; (b) Accounts Receivable from the sale of such furniture by bankrupt; and (c) cash proceeds arising from sales of furniture by bankrupt. The petitions were consolidated for trial.

Renfro-Wadenstein, bankrupt, was a retail concern dealing in furniture in Seattle, with a large store in the downtown business district. Petitioners were manufacturers of high grade furniture. For approximately five years prior to execution of the instant contracts, petitioners had been selling furniture to bankrupt on open account. Bankrupt retailed furniture of other manufacturers as well.

Bankrupt was in arrears with petitioners on its open account in 1927 and the early part of 1928. Bankrupt owed Irwin & Co. approximately $20,000, of which approximately $8,000 was for goods shipped during the year 1927 and the balance was for goods shipped prior to 1927. Bankrupt owed Ketcham & Rothschild approximately $17,000. Ketcham & Rothschild had a "frozen credit" arrangement with bankrupt whereby bankrupt was allowed credit on furniture of Ketcham & Rothschild's make to the value of $15,000 and was to maintain payment to date on all furniture above that valuation on

hand. Bankrupt paid an interest charge of 7% under the frozen credit arrangement.

In March, 1928, bankrupt sent an order for merchandise to Irwin & Co. Shipment was refused, Irwin & Co. declining to ship unless further payments were made on the account. Irwin and Rothschild held two conferences in March, 1928, concerning the Renfro account. Rothschild then came to Seattle. He was here four days. As the result of his trip the contracts, captioned "Consignment," were entered into between bankrupt and petitioners. (Tr. 112-117: 144-148; Exh. 1—Exh. 26 W. D.) Except for dates and names of parties the agreements are identical in terminology.

Renfro-Wadenstein signed each agreement under date of March 23, 1928. The Ketcham & Rothschild contract was delivered on that date to Rothschild in Seattle. Rothschild took the agreement with him to Chicago where J. W. Rothschild signed the same for Ketcham & Rothschild, inserting date on which the signature was affixed, March 30, 1928.

Two copies of the Irwin agreement were mailed to Irwin & Co. from Seattle. Irwin signed the agreement on behalf of his company, filling in the date April 1, 1928, but retained the original and copy until September 5, 1928, when he mailed a copy to the bankrupt.

Renfro-Wadenstein made an assignment for the benefit of creditors October 3, 1928. Petition was filed in bankruptcy on October 19, 1928. Adjudication was made

November 9, 1928. W. S. Osborn was elected as trustee, and qualified November 21, 1928.

On March 23, 1928, when Renfro-Wadenstein signed the so-called consignment agreements, there was furniture of each petitioner's *make* on the floor of Renfro-Wadenstein. As to this furniture, no issue is involved on the Trustee's appeal, since the Referee's holding that this furniture could not be reclaimed by petitioners was affirmed by the District Court. The same holding was made, and affirmed, concerning accounts receivable and cash proceeds from the sales of any furniture, whether shipped prior or subsequent to the execution of the so-called consignment contracts.

The only issue on this appeal is the effect of the *so-called consignment agreements on merchandise shipped by petitioners to bankrupt subsequently to March 30, 1928.*

The Referee decided that the contracts constituted sales, not consignments; and "that the circumstances outside the contracts required that they be given the legal effect of sales." The District Court modified the Referee's order only as to furniture shipped subsequently to March 30, 1928, holding that the agreements constituted contracts of consignment.

Shipments were made by Ketcham & Rothschild on April 2 and 7, 1928; by Irwin & Co. in April, May, July and August, 1928. Of these shipments there came into the hands of the trustee in bankruptcy merchandise of

Irwin's manufacture invoiced at $10,348.50 and merchandise of Ketcham & Rothschild's manufacture invoiced at $4,232.56.

The assets of the bankrupt were sold by the trustee, including furniture of petitioners' manufacture on bankrupt's floor, under stipulation between petitioners and trustee that a certain sum, aggregating 70% of the estimated value of the merchandise, accounts receivable and cash claimed by petitioners, would be set aside pending the outcome of this controversy. The order of the District Court awarded a money judgment against the trustee for 70% of the invoiced value of the furniture shipped by petitioners subsequently to March, 1928, or $7,243.95 to Irwin & Co.; $2,962.79 to Ketcham & Rothschild. The District Court also awarded petitioners a 3% interest charge on the above sums from April 12, 1929, to May 1, 1931, together with a carrying charge of 7% for a period beginning 90 days after shipment of furniture and ending on the date of the filing of the petition in bankruptcy, such carrying charge to be on the invoice value of the furniture shipped, and to constitute a *general claim* against bankrupt's estate. No costs were allowed.

SPECIFICATION OF ERRORS

The District Court erred in its order (Tr. 239-242) in the following particulars:

1. In deciding that the contract dated March 30, 1928, signed by Ketcham & Rothschild and Renfro-Wadenstein is a contract of consignment. (E. 1, Tr. 268.)

2. In holding that the contract between Irwin & Co. and bankrupt captioned "Consignment contract" is a contract of consignment. (E. 2, Tr. 268.)

3. In deciding that any furniture of petitioner Ketcham & Rothschild's make was held under consignment arrangement with the bankrupt. (E. 3, Tr. 268.)

4. In holding that any furniture of petitioner Irwin & Co.'s make was held by the bankrupt under a consignment arrangement. (E. 4, Tr. 268.)

5. In holding that no actual fraud was shown against petitioners within the state insolvency law or at all. (E. 9, 10, Tr. 269.)

6. In awarding judgment against the trustee on account of any furniture held by the bankrupt and shipped by petitioners or either of them to the bankrupt. (E. 5, Tr. 268.)

7. In awarding petitioners or either of them interest on the award made in paragraph I of the court's order. (E. 6, Tr. 269.)

8. In allowing petitioners or either of them a 7% carrying charge or any carrying charge. (E. 7, Tr. 269.)

9. In failing to allow to the trustee his costs taxable herein. (E. 8, Tr. 269.)

The above specifications of error are made without prejudice to the right of the trustee to assert additional assignments of error pertinent to the petitioners' cross appeal.

BRIEF OF ARGUMENT

I. The written contracts are *by their terms* sales, not consignments.

(a) The merchandise was "charged *provisionally* to consigned account."

(b) "Consignee shall pay all *freight* and *carrying charges* immediately upon arrival" of merchandise; and *all expenses of caring for the merchandise,* and insurance.

(c) Accounts receivable from sales of merchandise were property of Renfro-Wadenstein.

(d) The "consignee" incurred a present obligation, on demand of "consignor," to pay for the merchandise.

(e) Right to recall the merchandise during term of contract was not reserved by manufacturer.

(f) Dealer had no right to return the merchandise and receive credit therefor.

II.

The parties did not *operate* under the contract as consignor and consignee.

(a) Shipments by bills of lading were direct to debtors.

(b) The invoice price remained the same.

(c) The furniture was not invoiced on consignment.

(d) The interest rate remained the same.

(e) Renfro-Wadenstein exercised complete dominion over the merchandise.

(1) Dealer fixed the retail price.

(2) "Consigned" furniture was intermingled with other furniture on dealer's floor.

(3) Advertising furnished by manufacturer indicated ownership of furniture in Renfro-Wadenstein.

(4) Dealer sold "consigned" furniture on same bills with other furniture.

(f) Renfro-Wadenstein exercised complete dominion over the accounts receivable and proceeds from sale.

(g) Regular reports of sales were not made or required.

(h) Notes were accepted by Irwin & Co. in payment, and are still retained.

III.

The "consignment contracts" were devices to conceal a sale and were in fraud of creditors.

(a) Renfro-Wadenstein was insolvent and its insolvency was known to petitioners.

(b) Dominant idea with petitioners was to enforce payment by dealer.

IV.

The Irwin Contract is not a basis for reclamation.

(a) Contract was not completed until September 5, 1928.

(b) Contract is not retro-active and all merchandise was shipped before September 5, 1928.

(c) Contract was consummated within four months of bankruptcy.

ARGUMENT

I. The Written Contracts Are *by Their Terms* Sales, Not Consignments.

Introduction

It is the *inherent character* of the contract, not the designation or label which the parties apply to it, which determines whether a consignment exists.

"It is less difficult to arrive at a proper construction by determining the *benefits accruing and the burdens borne by the parties.*" *Reliance Shoe Co. v. Manly,* 25 Fed. 2nd 381, 383.

"This contract should be construed rather by *its express possibilities as to what the vendor may do and claim under it* than by its double aspect under which it may be a sale or not at the pleasure of the vendor." *Bradley-Alderson Co. v. M'Affee,* 149 Fed. 254, 260.

Agency is essential to the relationship of consignor and consignee.

"The essence of the agency to sell is the delivery of the goods to the person who is to sell them, *not as his own property, but as the property of the principal, who remains the owner of the goods, and who therefore has the*

right to control the sale, to recall the goods and to demand and receive their proceeds when sold, less the agent's commission, *but who has no right to a price for them before sale or unless sold by the agent." Meachem on Sales,* Sec. 43, Vol. 1, Pps. 40, 41.

"When the factor sells the goods to a third party, *the title is transferred from the original owner, directly to the third party, and at no point in the transaction does it vest in the factor or commission merchant. * * * The consignee holds them as bailee. If they are sold, the consignee holds the proceeds in the same manner.* The consignor has not merely a debt due him for the price, but he has a claim to the very fund which constitutes the proceeds of the sale. He owns the fund, and if the consignee withholds it or uses it, he is guilty of a conversion." *Mariash on Sales,* P. 8, *et seqq,* Par. 9, 1930 Ed.

(a) The merchandise was "charged *provisionally* to the consigned account." (Tr. 144; Exh. 1, Par. 1; Exh. 26 W. D., Par. 1.) "Provisional" is defined as "temporary, for the time being." *Anderson, Law Dictionary.*

"A provisional remedy is one which is provided for present needs, or for the occasion; that is, one adapted to meet a particular exigency * * *." *Davenport vs. Thompson,* (Iowa, 1928) 221 N. W. 347, 350.

"The word excludes the idea of permanency." 50 C. J. 833.

"Provisionally" has a two-fold significance in connection with these contracts. The first will be apparent when Paragraph 10 of the contracts is considered. The second phase will appear when the circumstances surrounding the execution of the contract, and the operations thereunder are considered. In any event, the word "provisionally" indicates a special contract to meet an exigency and man-

ifests that this was not an ordinary form of consignment.

(b) "Consignee" was required to "pay all freight and carrying charge immediately upon arrival" of the merchandise, to keep the merchandise insured and to pay the expenses of caring for the merchandise including insurance. (Tr. 144, Par. 2.)

(c) Accounts receivable from the sales of merchandise were property of Renfro-Wadenstein.

"In case party of the second part, due to its not having from its customers, payments for goods sold, shall not be able to make payment in cash (ie: to manufacturer), it shall give the party of the first part a demand note *collateraled by the assignment of accounts receivable at least equal to the amount of payments due for merchandise sold.*" (Tr. 145, Par. 5.)

One must have title to make an assignment as collateral. It necessarily follows that Renfro-Wadenstein owned the accounts receivable. This is inconsistent with consignment. See Meacham "Sales"; Mariash "Sales," *supra and* II (f) *infra.*

(d) The "consignee" incurred a present obligation to pay the invoice value of the merchandise upon demand by "consignor."

"This contract shall continue in force and effect *until terminated by one or both of the parties hereto* by written notice given to the other, *but in case of such termination, party of the first part shall have the right, at its option, to require party of the second part to keep and pay for the consigned goods then remaining on hand at the invoice price thereof* * * *." (Tr. 147; Par. 10, Exhs. 1 and 26.

This is one of the most significant paragraphs in the contract. The decision of the District Court on the consignment feature is based fundamentally upon the conclusion of the court that

"No present liability by the bankrupt was made, or right created to petitioner. * * * *The superadded agreement as to purchase was a condition which had not matured * * * The contingency not having matured into a fixed status,* the merchandise shipped on consignment and delivered to the trustee should be accounted for by him." (Tr. 237.)

The District Court relied entirely upon *In re Aronson* (D. C. Mass.) 245 Fed. 207 and *Mitchell Wagon Co. v. Poole* (C. C. A. 6th) 235 Fed. 817 to sustain the above propositions. We respectfully submit that neither case sustains the District Court's conclusion.

In the *Mitchell Wagon* case, dealer was bound to purchase and pay for the wagons, either (a) when he sold the wagons; or (b) within twelve months from date of the contract at *his (consignee's)* option; or (c) at the expiration of the selling period of twelve months; or (d) if *consignee* sold or closed out his business during term of the contract.

The court stated:

"The relation between them was that of principal and agent and not of seller and buyer. This follows from the fact that there was no agreement on the part of the bankrupt to pay the prices fixed for wagons—*it was not contemplated that he should pay for them except upon his becoming a purchaser in one of the contingencies named*

—and that the appellant had the right to demand a return of the wagons at any time."

"A *contingency* has the element of uncertainty and doubt, and is defined as an *event* which is possible, but which may or may not occur, in the nature of *casualty, accident or change, and results from an agency, the operation of which is uncertain.*" (Pope, Vol. 1, *Legal Definitions.*")

It will be observed in the *Mitchell Wagon* case and in cases there cited that the *contingency* upon which the transformation from a contract of consignment to a sale depends is either objective in its nature, that is to say, is a fixed and definite objective circumstance beyond control of either party to the contract, or is in effect not a contingency, but a matter of *option* on the part of the *consignee.* In no case has an agreement been held a consignment where it was the *right* of the *consignor to compel payment by consignee for the merchandise upon consignor's demand.* The practical difference is readily apparent. In cases such as the *Mitchell Wagon* case the consignor gains no advantage over the consignee or his creditors, because the event which makes the contract one of sale is either external and objective, or is determined by the consignee. In the present case, however, manufacturers had all the advantages of a sale by the mere formal act of declaring a termination of the contract under Paragraph X and thereupon demanding payment from dealer, and had also, under the District Court's ruling, all the advantages of a consignment so long as the contract remained in force. If consignee terminated the contract,

consignor could nevertheless require payment for the merchandise. In effect, therefore, the *consignor,* under the terms of the contract, dictated the basis for payment. If the optimism of Renfro-Wadenstein proved well founded the manufacturer could compel payment. If, on the other hand, as proved the case, the optimism was ill founded, then under the District Court's ruling manufacturer could reclaim and repossess the merchandise. The Bankruptcy Act aimed to eliminate as far as possible the expedient but unjust practice of the race going to the swiftest. Its principles should accord with equity. Consignments constitute a special class of contracts which need not be recorded under the laws of the state of Washington and which are therefore subject to grave abuse, being secret agreements in many cases without even constructive notice to other creditors of a dealer. To permit in addition a clause such as paragraph ten whereby a consignor, so-called, gains the advantages of consignment and of sale, extends the scope of consignments unduly. It will encourage in practice the growth of mushroom concerns with consigned furniture on their floors and with private agreements whereby if they prosper they pay for the merchandise and if they fail the merchandise is reclaimed at the expense of other creditors who have extended credit without being able to determine the dealer's actual condition.

In this case the obligation of the dealer was not contingent. No *event* need transpire. So far as Renfro-Wadenstein's obligations were concerned, the situation

would have been no different if Renfro-Wadenstein had given its promissory note to manufacturer covering the invoice value of the furniture. The manufacturer might in either instance defer the due dates. That does not argue that there was no obligation created. *Either* party may terminate the consignment contract *at any time.* When terminated by *either* party, "consignor" "shall have the *right, at its option* to require party of the second part to keep and pay for the consigned goods then remaining on hand at the invoice price thereof * * *." To say that by such terms "no present liability by the bankrupt was made, or right created to the petitioners," seems a total disregard of the *effect* of the terms. Petitioners had the *right* to compel payment when they chose.

In addition to the *Mitchell Wagon Company* case, *supra,* the District Court's conclusion on this phase is premised upon *in re Aronson,* (D. C. Mass.) 245 Fed. 207. We have studied that case carefully and we fail to see in what manner it supports the District Court's conclusion. In fact the *Aronson* case is most favorable to the trustee's position.

"Whether an arrangement is a consignment, a conditional sale, or a sale on credit, depends less on how it is described than on the rights and liabilities created by it. * * * To have agreed to buy goods, to take possession of them, to have the right to sell them at such price as one may fix, and the right to use the proceeds as one pleases *is to own the goods. Ownership is acquired on delivery of goods under such an understanding*, and it is not negatived by an agreement that, until they shall be sold by the vendee, the title to them shall remain in the vendor.

Such an agreement is inconsistent with the arrangement as a whole. *It is a misuse of language to say that the title is retained;* the facts show that it is not. 'Contracts of sale, under which title is to remain in the vendor, although the vendee may consume the goods, or sell them and apply the proceeds to his own use, are fraudulent as to creditors, because the stipulation that the title is to remain in the vendor is entirely inconsistent with the purpose of the contract.' *Ludvigh v. American Woolen Co.,* 188 Fed. 30, 33; 110 C. C. A. 180, 183; Id. 231 U. S. 522; 34 Sup. Ct. 161; 58 Law. Ed. 345." *In re Aronson,* 245 Fed. page 209.

In re Aronson cites only the *Ludvigh* case, *supra,* and *Flanders Motor Car Co. v. Reed,* 220 Fed. 642 (C. C. A. 1st). In the latter case a clause reserving title until the machines and parts were paid for in cash "did not go far enough, as against indications to the contrary, to establish a bona-fide understanding between the parties that the goods should, for all purposes, be the petitioners until the bankrupt had fully paid for them." (Page 644. See pages 643, 644.)

The court therein (p. 644) distinguishes the *Ludvigh* case, *supra,* holding the *Flanders* case was determined by *In re Garcewich,* 115 Fed. 87, (C. C. A. 2nd), which case confirms the Trustee's position herein.

The *Mitchell Wagon Company* case further distinguishes all cases cited by petitioners except the *Galt, Stoughton Wagon Co., Harris & Bacherig* cases and *In re Reynolds.*

Mitchell Wagon Co. v. Poole, 235 Fed. at page 822. The court admits that

"There is no decision of this court that can be said to be exactly in point." (Page 823.)

Considering the cases cited, the contract in *Harris & Bacherig,* (Tenn. D. C.) 214 Fed. 482, 483, stated

"If *either* party shall *fail or refuse* to perform any part of this contract, the other party shall have the right thereupon to terminate the same; and upon the termination thereof the consignors shall be entitled immediately to take possession of all goods on hand unsold. The consignor has the right to decide whether they want to take back the merchandise not paid for at that time or whether the consignee should pay for the merchandise at once * * *."

Under that contract, if one party defaulted, the *other party* had the right to terminate the contract. The consignor could not terminate the contract except upon default by the consignee. *Thus it was within the power of the consignee to prevent accrual of the right in consignor to compel a purchase,* and that simply by performing the contract. But in the instant case consignor can terminate the contract at will and can by the same token compel payment at will.

In *Franklin v. Stoughton Wagon Co.,* (C. C. A. 8th) 168 Fed. 857, the contract was entered December 28, 1907. Stoughton Wagon Co. was in bankruptcy before the twelve month period of the contract had expired. The contract provided that *"at the end of the twelve months,* said second party agrees if required by said party of the first part, to purchase at prices given in schedule or orders attached, all goods on hand unsold and not previously

settled for * * *." The question as to whether this constituted a sale was not discussed in the opinion, nor is there any indication that it was considered. In any event the expiration of the twelve months period was an objective condition which had not matured.

In the *Galt case,* 120 Fed. 64 (C. C. A. 7th), the court stated:

"The clause in the contract giving an option to the company to require Galt to give his note, or to pay in cash or to store, subject to the order of the company, the goods not sold within twelve months, *is probably the strongest clause in the contract to indicate a sale,* but as suggested by the Supreme Court of Illinois in *Lenz v. Harrison, supra, while it might have such force considered alone,* taking it with the whole contract it was seemingly incorporated to compel the agents promptly to sell, and report sales within the time stated." (Page 69.)

The wagons were ordered by consignee from consignor at the time the contract was executed. Consignee was not compelled under the contract to accept more wagons during the term of the contract. Thus consignee could save the necessity of purchase of the wagons by diligence in making sales as agent. In any event twelve months, a definite objective period of time, had to expire before the liability was incurred.

In re Reynolds, (D. C. Ky.) 203 Fed. 162, imposed no obligation upon the consignee to purchase the goods unless either (a) there were goods on hand *at the end of twelve months;* or (b) *agent* died; or (c) *agent* disposed of his business; or (d) *agent* desired to terminate the con-

tract. If the manufacturer terminated the contract, the goods were to be returned, *manufacturer to pay freight.* It was held that the petitioners had no right to the proceeds of goods sold by dealer.

The above authorities are the only foundation for the District Court's decision on this point. A recent construction has been placed upon the *Mitchell Wagon Company* case, *(In re Eichengreen,* (D. C. Md.), 18 Fed. 2nd 101), wherein the court, after stating the contingencies in the *Mitchell* case, asserted:

"The court held that, under the circumstances of that case, the relationship of the parties was that of bailor and bailee until one of these events took place, *since, otherwise, there was no agreement of the consignee to pay for the merchandise.* The decision was rested mainly upon the right given in the agreement to the consignor to require a restoration of the merchandise, *and upon the absence of an unqualified promise of the consignee to pay the purchase price for the thing alleged to be sold.* It is suggested that, if the receiver of the goods obligates himself to pay a fixed price at a fixed time, and there is no right on the part of the sender to a return of the goods, the contract is one of sale and not a bailment." (P. 105.)

There is an unqualified promise in the instant contract on the part of Renfro-Wadenstein to pay for the merchandise. The question of return of the merchandise will be considered *infra.*

Judge Bean's succinct decision in the case of *In re Roellich,* (D. C. Ore.) 223 Fed. 687, covers this question squarely, and fully sustains the trustee's position.

McKenzie v. Roper Wholesale Grocery, 70 S. E. 981, states:

"The test seems to be this: If the person to whom the possession of the property is delivered gets it by virtue of a contract of purchase (ie: gets it under such circumstances *that the person parting with possession can sue for the purchase price, irrespective of whether the person to whom the possession is delivered has sold or otherwise disposed of the goods),* the contract is one of conditional sale, notwithstanding it may impose limitations upon the purchaser's right to dispose of the property and may require a definite plan of accounting."

See also:

Sinnett v. Watkins Co., 282 S. W. 769, 770, 771.
Bradford and Co., Inc. v. U. S. Tent & Awning Co., 198 Ill. App. 505.

The essential question under the District Court's decision on the consignment feature is whether a present obligation was imposed upon the dealer and a present right vested in the manufacturer by paragraph X. That a right was created and an obligation imposed is illustrated in principle in *Green vs. Tidball,* 26 Wash. 338, 342; 55 L. R. A. 879; 67 Pac. 84, where the Court stated:

"The principal question is, was this right that the City had to levy an assessment upon the property to pay the costs of the improvement made in the street an incumbrance on the property within the meaning of that term as used in the deed? The appellants contend that it was not, because it had not attached at that time; that it was then but an *inchoate right, which might or might not thereafter become fixed and absolute, depending upon the action of the City;* and our attention is called to the City charter, which provides that an assessment for a public

improvement becomes a lien upon the property assessed 'from the time the assessment roll for such improvement shall be placed in the hands of the City Treasurer for collection' * * * The benefit conferred upon the land which gave rise to the right to make the levy, and without which no right to levy could arise, has been conferred. True, all of the steps necessary to protect the charge had not been taken, and the amount thereof being dependent on various considerations was undetermined, *and the City might or might not thereafter enforce the right.* In this *the right may be said to have been inchoate; but it was nevertheless a right which the City could enforce against the will and consent of the owner, and in spite of any objection he might make. As such it was a burden on the land depreciative of its value* * * *." (Pages 342, 343.)

In *Buffum vs. Descher,* 96 N. W. 352, there was a purported consignment agreement. The Court stated:

"If the goods were delivered to the consignee under such circumstances as to confer upon him absolute dominion over them and *he becomes bound to pay a stipulated price for them at a certain time, or upon the happening of any future event, the transaction amounts to a sale at delivery, and the title passes to him."*

On petition to recover proceeds of sale, the Court stated: *(In re Lenforth,* Fed. Cases 8369)

"At the end of the year they ('Consignees') were bound to pay, if required, for all goods remaining on hand. It is plain that this transaction in no respect resembles a consignment by a principal to a factor of goods to be sold on commission. It is a consignment of goods to be paid for at prices agreed upon and which bore no relation to the prices at which the consignees might sell or the amounts that they might be able to collect."

Further, suppose that the furniture had been seriously damaged by some element other than fire or water (against which the merchandise was insured). If the relation was that of principal and factor, the principal would have to bear the loss, *Sturm vs. Boker,* 37 Law Ed. 1093, 150 U. S. 312, 14 Sup. Ct. 99, but under the instant contracts, the manufacturers, on the happening of such event, could have given notice to dealer of termination of the contract and could have required payment for the furniture according to the invoice price thereof. (See 63 A. L. R. 373 N.) It is significant in this connection that such reservation of title as is made in the contract is not contained in a separate paragraph, but is an integral part of Paragraph X providing as follows:

"The consigned goods or the accounts representing the same and the proceeds thereof shall continue to belong to and be the property of said party of the first part until remittance therefor shall have been made to and received by said party of the first part *as herein provided.*"

"As herein provided" simply means until such time as "consignor" chooses to demand payment for the merchandise. If the furniture becomes obsolete, as furniture of that grade naturally would, or if it is damaged, or otherwise rendered valueless for sale purposes, the dealer can be made to pay therefor at the invoice price. This is wholly inconsistent with the relationship of principal and factor. See

Bradley, Alderson & Co. v. McAfee, infra (f); (D. C. Mo.) 149 Fed. 254.

Maxwell Motor Corp. v. Bankers Mort. Co., 192 N. W. 19, 20.

Arbuckle v. Kirkpatrick, 39 S. W. 3.

Thus Paragraph X imposed upon the dealer all the *obligations of a sale* and vested in the manufacturer the rights *incident to a sale.* It is the practical effect of the instruments to which the Court looks. Paragraph X does not hinge upon a *contingency* but vests in manufacturer an absolute right which he may exercise when he desires.

(e) The contracts do not reserve in the manufacturer the right to recall the specific merchandise during the term of the contract but permit the dealer to return "another thing of value."

"The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the *specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale." Sturm vs. Boker,* 37 Law Ed., p. 1100; 150 U. S., p. 329.

Reservation in the consignor of the right to compel the return of the specific thing sent, is a *necessary element* in a bailment; such right was not reserved in this case, however, except upon termination of the contract, and upon termination of the contract the consignor could dictate whether consignee should pay the invoice price or return the merchandise. The paragraphs relative to returning

the specific merchandise are Paragraphs VIII and X, Tr. 146, 147. Paragraph VIII does not give a *right of repossession or recall,* the only *right* of recall granted by the specific terms of the contract being under Paragraph X and arising only in case of termination of the contract. This matter is stated concisely by the Referee in his memorandum decision. (Tr. 204-206.)

Petitioners have not contended that a specific right to repossess the goods at any time was expressly granted by the terms of the contract, but rely upon the contention that Paragraph VIII, "pre-supposes the right to recall at any time, and where such a right is at any time pre-supposed it is in legal effect granted."

Petitioners insist that the words "at any time" in Paragraph VIII pre-supposed such right. However, under Paragraph X, manufacturer had the right *at any time* to terminate the contract and *thereupon* to require return of the furniture, if it chose. Paragraphs VIII and X are therefore consistent with Trustee's contention, and with each other. These contracts were drafted by petitioners and are therefore to be construed most strongly against petitioners. This is the more apparent when the operations under the contracts are considered *infra II.* See

> *Yarm v. Lieberman,* 46 F. (2d) 464, 466 (D. C. N. Y.)

"Since one who speaks or writes can, by exactness of expression more easily prevent mistakes in meaning than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter * * *."

Williston, "Contracts," Vol. II, Sec. 621, pp. 1203, 1204, citing authorities in Note 9, including *In re Eighth Ave.,* 82 Wash. 398, 144 Pac. 533, which states page 402:

"Parol evidence is seldom permitted to contradict a written contract. When the contradiction appears in the written evidence itself, the matter should be resolved most strongly against the party at whose instance the words were used."

In support of their contention petitioners cited the cases of *Mitchell Wagon Co. vs. Poole, Supra, In re Smith & Nixon Piano Company, infra; In re King & Franklin vs. Stoughton Wagon Co., infra.*

In the *Mitchell Wagon* case, *Supra,* the right of repossession was pre-supposed from the provision that the bankrupt should be entitled to freight and drayage paid out by him, if appellant should order the wagons reshipped or turned over to other parties when bankrupt had complied with the terms of the contract, but reimbursement was not to be made if appellant concluded it wanted possession because of any violation by bankrupt of the contract. (Page 821.)

The instant contract does not provide for reimbursement to dealer for freight, drayage, crating or any other item. If petitioners' contention is correct, the definite obligation has been placed upon dealer to "crate and place on cars at any time," without any correlative right in dealer. Positive and definite language was needed to impose such obligation.

In re Smith & Nixon Piano Co., (C. C. A. 8th) 149 Fed. 111, does not contain a discussion of this point. In that case "there was no present or fixed obligation to pay *either then or in the future* * * *." (Page 112.)

This Court, *In re King,* 262 Fed. 318, 321 (C. C. A. 9th) considered an *oral contract,* whereby a company was to keep King "supplied with a small stock of tires 'consignment for sale,' for which he would make a settlement every month by payment of an amount *twenty per cent less than the list price of the tires sold,* with a further five per cent off of said list price for a settlement of account within thirty days." Invoices bore terms, "consigned accounts."

A representative of the company went to King's shop every month and checked over the stock. King never placed orders for goods. At the end of the month, an accounting was had, and a separate account then made covering goods sold. Payments were regular. This Court stated (page 321):

"The fact that there was no express agreement that the title to the property delivered by the Empire Company to King should remain in the former, therefore the return by King of such portion of it as remained unsold by him to the consignor, does not show, nor, indeed, tend to show, that the transaction between the parties was anything more than the ordinary one of the consignment of personal property for sale, *unattended, as it was, by any positive acts of the consignor, that can be properly held to have enabled the consignee to commit any fraud upon the public.*"

Franklin v. Stoughton Wagon Co., 168 Fed. 857 (C. C. A. 8th), contains a clause which is unequivocal: "The second party hereby agrees to forward any goods received on its contract, at any time, *and as said Stoughton Wagon Company or their authorized agents may direct,* charging only actual freight and drayage and a reasonable transfer charge, *collecting same from transportation company as back charges.*" (Page 860.) A similar provision is contained *In re Taylor,* 46 F. (2d) 326, 329. See page 328 for definition of "consignment."

It is significant that consignment contracts which reserve the right to compel return of the goods provide for reimbursement to consignee of the expense of reshipment. Such is a natural incident of an agency contract. If consignor is to impose an obligation on consignee to pay freight upon return of the merchandise, the right of recall should be definite and unambiguous. In this case the reservation of title to the goods, to the accounts and to the proceeds was for the evident purpose of enabling the manufacturer to preserve the right created under Paragraph X of the contract. This being so, a right of recall during the life of the contract cannot be presupposed any more than such right could be presumed if no reservation of title were contained in the contract. See *In re Zephyr Mercantile Co.,* (D. C. Tex.), 203 Fed. 576, 579, 580.

(f) Dealer had no right to return the merchandise and receive credit therefor.

If dealer had shown an inclination to return the obsolescent furniture, manufacturer could have terminated the contract and demanded payment *instanter.* Nor is there any express provision in the contract permitting the dealer to return the merchandise and receive credit therefor. In *Reliance Shoe Co. vs. Manly,* 25 Fed. 2nd 381 (C. C. A. 4th), the Court stated (page 383):

"It will be seen that the bankrupt had no right to return the merchandise shipped for any cause and be discharged from liability, except where the shoes failed reasonably to conform to sample or were not the sizes ordered."

The opinion in *Bradley, Alderson & Co. v. McAfee* (D. C. Mo.), 149 Fed. 254, at page 259, reads in part as follows:

"We searched this contract in vain for any provision which enabled this so-called factor at any time or under any circumstances or condition, to return the goods, *except at the option of Bradley, Alderson & Co.* * *

at a specified date, Ward was compellable by Bradley, Alderson & Co. to pay for the goods at a designated cash price; he had no alternative left him of choice; *it was wholly at the election of Bradley, Aledrson & Co.* If so demanded by Bradley, Alderson & Co., when the time arrived, just as in the case of any other purchaser of goods, Ward was compellable to pay the stipulated price, whether or not he had sold a single article. This payment made, he would become the absolute owner. I respectfully, but earnestly, submit that if such a contract can pass as a consignment made to a factor, all that any vendor has to do to evade and render valueless the declared public policy of the state, to compel the placing of conditional sales, or delivery contracts, on record, is

to send his wares to a country merchant to be displayed in his store as his own, and sell to whom he may select, to be paid for to the sender at a future time, at a given price, at his option, provided only that the sender call the transaction *inter nos* a consignment or commission, or himself principal and the sendee his agent. If when the time of payment arrives, the shipper wants his money, he elects to have the sendee pay the cash provided he then be solvent; but if the sendee become insolvent and bankrupt, the sendor then leaves himself in position to exercise his other option to demand and reclaim the goods. If such cunning jugglery as this can get around or through the Missouri statute, then it is but a cobweb through which the cunning of the vendor with the subservient assistance of his vendee may break at will."

Such is likewise the effect of the instant contracts whereby the manufacturer may at any time compel payment for the merchandise. The statute of the State of Washington relative to conditional sales contracts is to the same substantial effect as the Missouri statute above referred to, and reads as follows (Remington Compiled Statutes, 3790; Remington & Ballinger's Code, 3670):

"That all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to all bona fide purchasers, pledgees, mortgagees, incumbrancers and subsequent creditors, whether or not such creditors have or claim a lien upon such property, unless within ten days after the taking of possession by the vendee, a memorandum of such sale stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county wherein at the date of the vendee's taking possession of the property, the vendee resides."

See also:

In re Martin Vernon Music Co., 132 Fed. 983, 985 (D. C. Mo.);

Peoria Mfg. Co. v. Lyons, 153 Ill. 427, 38 N. E. 661.

We submit that the written contracts by their terms imposed upon dealer obligations incident to a sale and vested in manufacturer rights consistent only with a sale. Merchandise was charged provisionally to consigned accounts; consignee paid full freight and carrying charges and all expenses of caring for merchandise; accounts receivable were property of dealer; a present obligation was incurred by dealer to pay invoice price of the merchandise at any time manufacturer demanded payment; right of recall of merchandise was not reserved in manufacturer except in connection with termination of contract and the right incident thereto of manufacturer to compel payment for the merchandise; and dealer had no right to return the merchandise and receive credit therefor. The contracts were framed by petitioners; the burden is upon petitioners to establish as against the trustee that the contracts are consignments; ambiguities are to be resolved against petitioners; the practical effect of the written contract is a sale.

II.

THE PARTIES DID NOT OPERATE UNDER THE CONTRACTS AS CONSIGNOR AND CONSIGNEE.

"Whether the transaction was a bailment or a sale, will not be determined solely by the words employed in the written instrument. Its meaning being doubtful, the Court will look also to the acts and circumstances of the parties, *especially to the construction which they themselves put upon the contract in executing it.* The real characteristics of a sale or *their legal effects* are not changed by calling it a bailment. The Court will look to the purpose of the contract rather than to the name given it. * * *" *Samson Tire & Rubber Co. v. Eggleston,* 45 Fed. 2nd 502, 504 (C. C. A. 5th).

Ketcham & Rothschild and Renfro-Wadenstein had been operating under a "frozen credit" arrangement, prior to the execution of the so-called consignment contracts. Ketcham & Rothschild would extend Renfro-Wadenstein "a credit for merchandise" which would *remain as indebtedness* from Renfro-Wadenstein to Ketcham & Rothschild up to $15,000.00 that Renfro-Wadenstein would use towards having samples to that value on their floor. Any merchandise that they bought in excess of that sum, or that was not to be on their floor, they would pay in their usual terms, 2 per cent, 30 days, net 60 days, 30 extra." (Tr. 29.) This arrangement was operative in 1927 and to the date of the execution of the so-called consignment contract. (Tr. 29.) A comparison of the operations under that arrangement and

those under the consignment contract so-called shows that the parties treated the latter contract as a sale, not a consignment.

(a) The shipments by bills of lading were always directly to Renfro-Wadenstein. There was no change in this respect after the execution of the consignment contract. (Tr. 17, 34, 53.)

(b) The so-called consignment agreement made no difference in the invoice price which debtor was required to pay Ketcham & Rothschild and Irwin & Co. (Tr. 53.)

(c) The furniture was not invoiced as on consignment. The invoices both of Irwin and of Ketcham & Rothschild bore the designation, "Terms special." (Exhibits 55, 56 attached to W. D.; Exhibit 3.) This same designation had been used under the frozen credit arrangement. (Tr. 49, 50.) The printed form of invoice of Ketcham & Rothschild in 1927 contained the words "Terms 2%—30 days, or net 60 days." (Tr. 30.) Yet there was *typed* on the forms "Terms special." (Exhibits B—4 parts.) Entire secrecy was employed in connection with these invoices. (Tr. 30, 31).

The use of the words "Terms special" simply meant that the maturity was deferred and that debtor was given delayed dating. (Tr. 27, 28, Exhibit A.)

(d) The interest rate remained the same.

The interest rate under the frozen credit arrangement was 7 per cent (Exhibit A; Tr. 28). The "carrying

charge" is 7 per cent in the consignment contract. (Tr. 146, par. 6; see also Tr. 53.)

(e) Renfro-Wadenstein exercised dominion over the merchandise.

(1) Dealer fixed the retail price.

The contracts provided only that retail sales should be made "at prices not less than the net invoice price." (Par. 2, Tr. 145.) Dealer realized nothing from the sale unless it obtained more than the invoice price and dealer was in any event liable for the invoice price when the sale was made at retail. In addition, dealer had freight, carriage charges, interest and overhead to meet. Obviously a limitation that sales could not be made at less than the net invoice price meant little or nothing on such high grade furniture as that of petitioners' manufacture, and under the above circumstances. This Court has considered the effect of such an arrangement in *Miller Rubber Co. et al. v. Citizens Trust & Savings Bank, in re Newerf's Estate* (C. C. C. 9th), 233 Fed. 488, wherein the transaction was held to be a sale.

"We find the confirmation of this view in the failure of the consignors to fix by the contract *the prices at which the agent could sell the goods to its customers.* * * *."

Mitchell Wagon Co. v. Poole, 235 Fed 817, strongly relied upon by petitioners, states in part:

"But if the consignee is at liberty according to the contract between him and his consignor to sell at any price he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price, and at a

fixed time, in my opinion whatever the parties may think their relation is, it is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers *is not a contract made on account of his principal, for he is to pay a price which may be different from those fixed by the contract. * * * He is to undertake to pay a certain fixed price for those goods at a certain fixed time to his principal, wholly independent of what the contract may be which he makes with the person to whom he sells;* and my opinion is that in point of law the alleged agent makes, on his own account, a contract of purchase with his alleged principal, and is again reselling." (Quoting from *Ex parte White,* L. R. 6 Chan. App. 397, p. 821.)

Permitting the consignee to retail at any price the consignee may deem fit is an indication of sale. *In re Penny and Anderson,* 176 Fed. 141; *Taylor v. Fram,* 252 Fed. 465; *In re Sachs* (C. C. A. 4), 30 Fed. (2nd) 510, 512.

In re Leflys (C. C. A. 7th), 229 Fed. 695, concerned an agreement, allegedly a consignment, amongst other provisions of which was one to the effect that the retail price should be not less than the invoice price. The agreement was held not to be a consignment. The Court quoted from *Chickering v. Bastress* (Ill.), 22 N. E. 542, as follows:

"The provision (of the contract) authorizing the company to determine solely for themselves at what price they would sell the pianos from their store, is *almost conclusive* that in reality they were not acting as agents for factory of the Chickering, but that without further provision they were to bear as their proper burden all the expenses of shipping, etc. It seems there is no doubt that

the contract was not one of bailment or of principal and factor." (P. 698.)

The same principle is asserted *In re Rabenau* (D. C. Mo.), 118 Fed. 471, 475; *Weston et al. v. Brown et al.,* 53 N. E. 36, 38; *In re Agnew,* 178 Fed. 478, 481 (D. C. Miss.).

The elements essential to a consignment contract were carefully considered in *High Grade Electrical Store* (Cal.), 3 Amer. Bankruptcy Reports (N. S.), 78. *The Court referred to the lack of an agreement as to what penalty, if any, might be enforced by the petitioner in event of bankrupt's failure to maintain retail prices above the minimum set in the contract.* (Pp. 79.)

The District Court in Illinois *In re U. S. Electrical Supply Co.,* 2 Fed. 2nd 378, stated:

"The contract does not fix the price which the United States Electrical Supply Company was to receive for the wire, *and the evidence shows that no attempt was ever made by the Rome Wire Company to regulate such prices.* The courts hold that this is an element of the contract to be taken into consideration in determining whether it is bailment. The reason is that if the contract is a bailment *the proceeds belong to the consignor, and the consignor is interested in seeing that the goods are sold at the proper prices.*"

Irwin testified: "We did not at any time instruct the dealer as to the price at which they should sell the merchandise." (Tr. 16.)

Wadenstein: "Outside of the consignment contract, we never had any correspondence with the claimants, or

either of them, afterwards in the handling of the matter in which they told us what prices we were to charge." (Tr. 57.) Also, Rothschild, Tr. 25.

Furthermore, at any time during the period of the contract, dealer could pay the invoice price to manufacturer.

2. The furniture was intermingled with other furniture on the floor and had no distinguishing marks to give notice to the public that it was consignor's furniture.

There is nothing in the contract which requires that the merchandise be kept separate and apart from other merchandise on the floor of dealer. Petitioners were aware that the furniture would have to be intermingled with other merchandise on dealer's floor. (Tr. 17, 33, 34.) Aside from small pasters or metal tags there was nothing on the furniture to indicate that it belonged to petitioners nor was there anything on the tag which indicated that the furniture was delivered to the dealer other than on a direct sale. (Tr. 17, 34, 52.)

The language used by this Court in *Miller Rubber Co. v. Citizens Trust & Savings Bank*, 233 Fed. 488 (C. C. A. 9th), is particularly appropriate:

"Not only was the agent permitted to mingle the consigned goods with his own stock, but the contract expressly provided that consignors would furnish the consignee 'free of charge all samples of tires and accessories and necessary advertising matter, imprinted with the name and address of the consignee.' It is difficult to see how the consignors could have more effectually held the

consignee out to its customers as the real owner of the consigned property; to permit them to retake from the stock of the bankrupt the remaining portion of the consigned goods would in our opinion operate as a fraud on the creditors of the bankrupt."

We shall see under the next heading that advertising was furnished Renfro-Wadenstein. In the *Miller Rubber Company case,* Newerf was a sole agent; the tires were to be furnished "on consignment"; were to remain the property of consignor. Monthly reports were required together with monthly statements for all purchases. Yet, reclamation was denied.

3. Advertising was furnished by manufacturers and distributed by dealer, giving indication to the public that the merchandise was dealer's.

Wadenstein: "These two firms, or one of them, sent us literature from time to time advertising their furniture; this was for distribution by our firm and it did not give notice or advertise in any way that this furniture did not belong to Renfro-Wadenstein." (Tr. 57, 58; Exhibits 23, 25, 33, 35.)

See *Miller Lumber Co. v. Citizens Trust & Savings Bank supra.*

4. The furniture was sold by dealer on the same bill with other furniture. (Tr. 53, 54.)

Furthermore, "the dealer could sell on conditional sales contract." (Rothschild, Tr. 33.)

In *Buffum v. Descher*, 96 N. W. 352, there was a purported consignment agreement under which payment was

to be made contingent upon a sale by the so-called consignee. The Court stated:

"If the goods are delivered to the consignee under such circumstances as to confer upon him *absolute dominion* over them, and he becomes bound to pay a stipulated price for them at a certain time, or upon the happening of any future event, the transaction amounts to a sale at delivery, and the title passes to him."

See also:

Flanders Motor Co. v. Reed (C. C. A. 1st), 220 Fed. 642, 644; Mariash, "Sales" *supra;*

In re Penny & Anderson (D. C. So. Dist. N. Y), 176 Fed. 141;

Pontiac Body Co. v. Skinner (D. C. N. D., 158 Fed. 858, 861;

In re Taylor, 46 F (2d) 326, 328.

(f) Dealer exercised complete dominion over accounts receivable and proceeds. (Tr. 17.)

Irwin: "After the dealer sold the merchandise we made no effort to find out what it did with the money." (Tr. 17.)

Wadenstein: "*There was no difference in the matter of assigning the accounts after the consignment agreement than there was before.* (See Tr. 51, 60, 61.)

Rothschild was less frank on the matter of assignments. He acknowledged that he knew the dealer was assigning accounts to discount companies in March, 1928. (Tr. 27, 31.) Rothschild denied any knowledge that accounts receivable representing the "consigned merchandise" had been pledged or hypothecated or assigned by dealer.

However, in reply to a letter under date of August 24, 1928, from Renfro-Wadenstein to Ketcham & Rothschild, in which Renfro-Wadenstein apologized for not being able to enclose a check, stating that "collections and business during the summer months, as you undoubtedly know, are difficult"; dealer wrote: "possibly you do not realize that under our method of carrying accounts we have to carry a substantial reserve on these and altogether we have quite a little money tied up in accounts receivable." (Exhibit 35, Tr. 32.) Rothschild stated in his letter of August 28 to dealer (Exhibit 36):

"We notice particularly the last paragraph of your letter, *and would have you understand that we are thoroughly acquainted with how you are carrying your accounts, which makes it all the more difficult for us to understand why we should not receive our money promptly when due* * * *." (Tr. 32.)

An incident to a valid consignment contract is that the proceeds of sale of consigned goods shall be kept separate and apart from the proceeds from sales of other goods of consignee.

"My attention has not been called to any case where the consignee was permitted to mingle the proceeds of the sale of the consigned goods with the consignee's own money, and to use these proceeds in the usual course of his business, where it has been held that such a contract constitutes a bailment, and is valid as against the rights and interests of an execution creditor or a trustee in bankruptcy.

"A contract of this nature is valid as between the parties as a conditional sales contract but is constructively

fraudulent as against the trustee in bankruptcy, who stands in the position of an execution creditor.

"My conclusion is that the contract between the parties in this case was not a bailment, but was a sale with reservation of title in the seller until the purchase price was paid, and that such reservation of title is not valid as against the trustee in bankruptcy in this case." *In re United States Electrical Supply Co.* (D. C. Ill)., 2 Fed. 2nd 378, 383.

The opinion in that case cites and quotes many authorities to the same effect. (Pages 380 *et seqq.*)

"* * * All the essential elements of a contract of agency must unite before the goods can be successfully reclaimed by the seller; * * * if there be promissory notes or accounts in payment of the goods, such notes and accounts must be either forwarded to the seller or accounted for by the purchaser and held by him subject to the orders of the seller to be forwarded to him upon demand. All of these elements must unite to make such a contract of consignment as that the goods will be returned to the seller in reclamation proceedings."

In re Agnew (D. C. Miss.), 178 Fed. 478.

Fairbanks Co. v. Graves, 90 Miss. 453, 43 Sou. 675,

held that:

"The trust is lost, because of the co-mingling of the proceeds of the sale witih the assets, and possession of the notes, accounts and cash representing such sale were not demanded or taken possession of by the petitioner or anything done by him to procure such assets."

Taylor v. Fram (C. C. A. 2nd), 252 Fed. 465, is especially apt:

"If the bankrupt had given defendants a mortgage upon the stock in the store and had been permitted to sell the stock covered by it and to deposit the money received in its general account and use it to meet his liabilities as if no mortgage existed, instead of paying it over to the mortgagee, we should be obliged to hold that the mortgage was fraudulent as against the trustee in bankruptcy. (Citing authorities.) If that be so as to a mortgage of record, and of which creditors have constructive notice, it should follow *a fortiori* that an agreement of which creditors have no constructive notice, which reserves title to the consignor, *which nevertheless and contrary to its terms permits the consignee to make sales and deposit the proceeds of sale to his general bank account and use them for his own purposes is equally fraudulent as against the trustee.* * * * Prior to the so-called agreement it is admitted that the bankrupt and defendants dealt with each other as vendor and vendee. After the agreement, the bankrupt admits that he fixed the price of the shoes sold; he testifies that he sold them at any price he wanted to, altho the paper agreement provided that he was not to sell for less than the price fixed by defendants. When he sent the defendants any money, he did not accompany it with any statement of goods that he had sold, but paid him so much on account. *It was his habit to take the daily receipts of all sales made at his store and deposit them in his bank account, which contained the moneys realized from his general sales of defendants' stock and everybody else's stock.* The bankrupt's testimony that the cartons received had been marked either by himself or the defendant is contradicted flatly by a dealer who is selling him goods and carefully examined the boxes and testified that there were no initials on the front of any of the cartons in any part of the store.

"If it be said that what was done was contrary to the agreement, the answer is that the defendants by their conduct permitted the agreement to be ignored. * * * *Under the circumstances, we do not think that defendants*

are in a position to invoke the written agreement as against the trustee."

See also:

In Matter of High Grade Electric Store, 3 Amer. Bkpt. Reports, N. S. 78;

In re Shiffert (D. C. Pa.), 281 Fed. 284;

Flanders Motor Co. v. Reed, 220 Fed. 642, 644;

In re Penny & Anderson, 176 Fed. 141;

Adriance v. Rutherford Mill Co., 23 N. W. 718;

In re Wells, 140 Fed. 752 (D. C. Pa.);

In re Carpenter (D. C. N. Y.), 125 Fed. 831, 834;

Schultz, Trustee, v. Wesco Oil Co., 149 Wash. 21, 26, 27, 28; 270 Pac. 130; 63 A. L. R. 351.

By way of illustration, as to the discount companies who have paid out money on these accounts (Tr. 79 *et seqq.,* Edris; Tr. 82 *et seqq.,* Bailey) the petitioners have no firm position for they have permitted this to be done with full knowledge and, as between the two, under the well-known principle of law that when one of two persons must suffer by the fault of a third, the loss shall fall upon him who has enabled such person to do the wrong, the claimant must suffer the loss.

Bonnivier v. Cole, 90 Wash. 526, 530.

As to the trustee in bankruptcy, who occupies the position of a creditor holding a lien, claimant's position must necessarily be weakened. The testimony is clear that each petitioner had knowledge of the pledging of accounts. (Tr. 16, 27, 31, 32, 62.)

(g) Regular reports of sales were not made by dealer to manufacturer. (Tr. 14, 19.) See cases under "E" *supra* concerning the necessity for regular reports.

(h) Notes were accepted by Irwin & Company in payment for merchandise shipped under consignment, and are still retained. (Tr. 14, 15.)

III.

THE "CONSIGNMENT CONTRACTS" WERE DEVICES TO CONCEAL A SALE AND WERE IN FRAUD OF CREDITORS.

(a) Petitioners knew that Renfro-Wadenstein was insolvent at the time of the execution of the so-called consignment contracts.

Dealer was indebted heavily to each petitioner; notes and renewal notes had been delivered to petitioners and many notes had been protested. (Tr. 12, 26, 27, 41, 44, 45.) Rothschild's entire account of approximately $17,000.00 was covered by notes. (Tr. 19.) Irwin admittedly was anxious about the account and refused to ship further merchandise. (Tr. 19, 39, 40.) Rothschild also refused to fill pending orders until the old account was cleaned up. (Tr. 4, 19, 39.) Of the $20,000.00 indebtedness to Irwin's firm, $12,000.00 was for merchandise shipped *prior to 1927.* (Tr. 3.) Irwin and Rothschild conferred twice. Rothschild made a special trip to Seattle. He was here four days. After his investigations here, he decided to bring up the matter of

consignment. (Tr. 4, 18, 19, 23.) And although at that time Ketcham & Rothschild sold to 300 retail furniture stores throughout the United States, this was Rothschild's first experience with a consignment and Rothschild admitted that he would have preferred the routine open account. (Tr. 24.) Rothschild admitted that he and Irwin thought the dealer had insufficient working capital. (Tr. 23.) It will not do for petitioners to claim reliance upon financial statements submitted to them by Renfro-Wadenstein when they knew the status of their own accounts with dealer-deferred payments, renewed notes and reiterated requests for extensions in payment—and when Rothschild, after a special trip to Seattle, made full investigation as to Renfro-Wadenstein's condition. Sagacious men, such as Irwin and Rothschild, are not prone to accept self-serving statements of a retail concern under circumstances as related above. As to the practice of dealer and the knowledge of petitioners concerning dealer's condition see Tr. 12, 13, 25, 26, 27, 45, also Exhibit 46, trustee's Exhibits 'E," "F," "I," "J."

Insolvency.

Renfro-Wadenstein had throughout its history of four or five years pursued a practice of paying its bills with furniture manufacturers by notes and of renewing those notes. (Tr. 40.)

"There was no question at all that we were operating with too little capital. * * * As far as paying all of our bills in the course of our business, I don't think there was a time in the history of our business that we could

have done that. There was not a time in the history when we could pay all our bills and stay in business." Wadenstein, Tr. 46; see also Tr. 47.

It is significant that within a few months after the execution of the "consignment" agreements, Renfro-Wadenstein contemplated an assignment for the benefit of creditors, even despite their optimism and enthusiasm over their new location. (Tr. 55, 73, 74, 77.) The over-expanded and under-capitalized condition of their concern had reached the point where it was necessary to make a general assignment, later followed by bankruptcy with enormous liabilities and only sufficient assets to pay relatively small dividends. Balance sheets were introduced by petitioners purporting to show a net equity of $100,000.00 as of April 1, 1928; these balance sheets, Exhibit 54, were received in evidence upon the condition stated by the referee: "It will have to be supported by the trial balances and the authenticity of the trial balances from the books; otherwise, it would not be considered." (Tr. 63, 64.) These conditions were not complied with; the bookkeeper who made up the trial balances was not present to testify and Wadenstein admitted that he had never checked the trial balances prepared by Racine & Company with the books. (Tr. 63.)

It is apparent, however, that Renfro-Wadenstein was not able to pay its debts in due course of business, and was therefore insolvent so far as creditors were concerned. This is the undoubted test in the State of Washington.

Nixon v. Hendy Machine Works, 51 Wash. 419; 99 Pac. 11.

Simpson v. Western Hardware & Metal Co., 97 Wash. 626; 167 Pac. 113.

Ronald v. Schoenfeld, 94 Wash. 238; 162 Pac. 33.

McKay v. Sperry Flour Co., 95 Wash. 209; 163 Pac. 377.

Jones v. Hoquiam Lumber & Shingle Co., 98 Wash. 172; 167 Pac. 117.

McKnight v. Shadbolt, 98 Wash. 665; 168 Pac. 473.

Climenson v. Carson, 284 Fed. 507.

Wilson v. City Bank of St. Paul, 84 U. S. 473.

Pirie v. Chicago Title & Trust Co., 182 U. S. 438; 45 Law Ed. 1171.

Brooks v. Parsons Co., 124 Wash. 300, 302, 303; 214 Pac. 6.

It is well settled that the trustee may avail himself of the benefits given to existing creditors of the bankrupt *under state law* in order to avoid any transfer to one not a bona fide holder for value, the transfer having been made at the time of bankrupt's insolvency.

Stellwagen v. Clum, 62 Law Ed. 507; 245 U. S. 605.

Davis v. Willey (C. C. A. 9th), 273 Fed. 397.

In the latter case it is said in effect that the trustee is subrogated to the rights of the creditors and may therefore take advantage of such remedies as are open to a creditor. Therefore, the test of insolvency under the

state law may be applied to determine whether a particular transfer was or was not fraudulent as to the creditors. This being so as to fraudulent transfers, the same test should be applied when measuring the good faith of the petitioners in entering into the "consignment" contract with dealer.

Intent to Extend Credit.

Not only was dealer insolvent within the knowledge of petitioners at the time the consignment contracts were entered into, but it is also apparent from Irwin's and Rothschild's testimony that the dominant idea in their minds was the extension of *further credit.* On page 6 of Irwin's deposition (Exhibit 55) he testifies:

"A. We both had confidence in Renfro-Wadenstein and were anxious to work out a plan whereby we might be justified in extending to them a sufficient credit in order to enable them to handle our goods in quantities."

Irwin testified to the same effect repeatedly. (Pp. 63, 75, 82.)

If these statements as to the extension of credit were infrequent and casual in the deposition, one might not attach particular importance to them. Where, however, a capable business man such as Irwin testifies repeatedly that the dominant idea with him was the extension of credit to Renfro-Wadenstein and that the principal object in a new arrangement was to relieve Renfro-Wadenstein of immediate payment and to extend the time for payment, we submit that such testimony is vital in de-

termining the purpose of these arrangements. Rothschild and Irwin had consulted over this matter and had come to a common agreement. Irwin had authorized Rothschild to act for his company, subject to Irwin's final approval. (Tr. 4.) They had made the same analysis of the situation and had come to the same conclusion. The ultimate motive in their minds was to extend *credit* to the bankrupt without impairing their own position.

Those availing themselves of the benefits of consignment should conform strictly in their contract and in their operations thereunder to the requirements of consignment. The intent of the parties, the surrounding circumstances, the knowledge of petitioners as to dealer's financial condition and the operations of the parties under the contract, all indicate *mala fides* in connection with these contracts.

IV.

THE IRWIN CONTRACT, EVEN IF A CONSIGNMENT, IS NOT BASIS FOR RECLAMATION.

The Irwin contract was not complete until September 5, 1928. (Tr. 4 to 10, incl.) The order adjudicating dealer a bankrupt was entered November 9, 1928. In Irwin's case there was no acceptance of the contract by manual delivery. Rothschild was not authorized to complete negotiations with the dealer on behalf of Irwin & Company without the latter's final approval. (Tr. 4.)

The Irwin contract was mailed to Irwin & Company and was received about March 27, 1928 (Tr. 4), and was signed on that date by Irwin & Company, but Irwin did not accept the contract until September 5, 1928. (Tr. 4, 5, 10.) In fact, Irwin twice wrote dealer, indicating that until the bill of sale was satisfactory to him, he would not mail a copy of the consignment contract to Renfro-Wadenstein. (Letter dated May 4, 1928, Exh. 38; letter dated June 4, 1928, Exh. 43.)

Irwin refused to accept this consignment contract as framed. Paragraph IX thereof recited in effect that dealer had in its possession certain goods theretofore sold and delivered to it on credit and not paid for,

"and it is hereby agreed that the title to said goods and the same is hereby transferred and conveyed back to said party of the first part (manufacturer) and that from and after this date the same shall be treated as having been delivered to said party of the second part on consignment and under and subject to all the terms and conditions of this contract. In consideration of the transfer and conveyance of the title to said goods back to said party of the first part, that company does hereby cancel the indebtedness of said party of the second part for said goods."

Had this been the final agreement in the Irwin contract, as it was in the Rothschild contract, all that was needed was a ministerial act of listing the merchandise on the dealer's floor to determine the exact invoice value. Irwin, however, wrote dealer on May 4, suggesting that dealer *retain title* to all Phoenix merchandise and "as

much of the Royal as will leave the balance the amount of our account less the cash payments which it was arranged with Mr. Rothschild that he will make. * * * Please have the bill of sale corrected in this manner and return it to us *and we will forward the consignment arrangement as arranged for with Mr. Rothschild.*" (Tr. 6, 7, 38. See also Tr. 8, 9, 10 and Exh. 43.)

In other words, Irwin was saying in effect: "We do not want back all the furniture as provided in the contract; we insist on a modification of paragraph IX whereby we take back only so much furniture as we have specified in our correspondence; until you are willing to accept these terms we shall withhold the consignment contracts."

This amounted to a *modification* of paragraph IX of the "consignment contract" *excluding certain of the furniture on hand from the terms thereof.* It was not until September 5, 1928, that Irwin was willing to write an acceptance. (Exhibit 51.)

"An acceptance must be positive and unambiguous," Williston *"Contracts,"* Vol. 1, Sec. 72, p. 127, and cases there cited. It is equally elementary that if any provision is added or change made in the offer of one party, the offer is rejected unless and until the offeror accedes to the change or addition. Williston *"Contracts,"* Vol. 1, p. 128, Sec. 73.

"A conditional acceptance is in effect a statement that the offeree is willing to enter into a bargain differing in some respect from that proposed in the original offer."

Williston "Contracts," Vol. 1, Sec. 77, pp. 134, 135.

True, Irwin testified that the parties had from April 1 been operating under the consignment arrangement. However, it is the legal effect of what the parties did, not Irwin's self-serving interpretation thereof, which concerns us. Nor is Irwin, under the circumstances of this case, in position to ask a court of equity to take his own interpretation of dealings which are so patently doubtful in character.

The "consignment contracts" are prospective in their operations, not retrospective. They cover furniture *to be shipped.* Irwin shipped no furniture after September 5, 1928, therefore the Irwin contract creates no right of reclamation.

Assuming, without granting, that the contract is retroactive, it was executed within four months of the date on which dealer was adjudicated bankrupt, namely November, 9, 1928.

Whereas in Ketcham & Rothschild's instance the sale back to manufacturer contemplated a transfer of *all* furniture of manufacturer's make, *then on the floor of the dealer,* which furniture had been approximated by a personal investigation of Rothschild in the stock records of the dealer, the final agreement with Irwin did not constitute such a complete transfer. (Tr. 20, 21.)

Furthermore, in Irwin's case dealer had on his floor more goods in value than the amount which it owed Irwin

& Co. (Tr. 6), whereas in Rothschild's case dealer owed Ketcham & Rothschild more than the invoice value of Rothschild furniture on dealer's floor. (Tr. 20, 21.) This fact was apparent from the approximation made from the stock cards and was known to Rothschild when the consignment agreement was signed. Rothschild accordingly accepted *all* of the furniture of its make on dealer's floor, taking notes from dealer for the balance above value owing on the account. Irwin refused to accept all the merchandise on dealer's floor for the reason that it exceeded in value the amount owing from dealer to Irwin & Co. Thus it is apparent that the intent of the parties to the Rothschild contract on March 23, when the signed contract was delivered to Rothschild, was that all the furniture on dealer's floor had been conveyed back to Rothschild. Such was never the contract in the Irwin case and the completion of the final terms was delayed until September 5th.

INTEREST AND COSTS.

The District Court awarded interest at the rate of three per cent per annum from April 12, 1929, to May 1, 1931. (Tr. 240, 241.) There was no stipulation between the parties that the money should be placed on deposit or that the trustee should be accountable for interest thereon, the stipulation providing simply that certain sums should be held aside *in lieu of the merchandise.* (Tr. 184.) Obviously, had the merchandise itself been held pending the action, there would have been no

appreciation in value. In the absence of stipulation making the trustee liable for interest we respectfully submit that no interest should have been allowed.

The trustee asks for his costs as contained in cost bill, Tr. 245, 246.

PETITIONERS' AUTHORITIES.

It would unduly lengthen this brief to distinguish the authorities cited by petitioners. We find no case which sustains a contract vesting in the consignor the broad rights and imposing upon the consignee the onerous obligations created and imposed by these contracts, except as contracts of sale. Particularly is this true where the operations under the contracts manifest the intent of the parties to create relationship of creditor and debtor instead of consignor and consignee. It is significant that the memorandum decision of the referee in bankruptcy and the decision of the District Court make no reference to decisions from this state on the consignment feature except as the referee's decision distinguishes certain cases. The fact is that the contracts under consideration are a departure in the practical obligations created thereunder from consignment contracts heretofore considered by the courts. Without further elaboration, we confidently assert that petitioners have cited no case on all fours with the instant case.

CONCLUSION.

There is admittedly considerable confusion in the law of consignment contracts. Some courts have held one

provision indicative of sale; other courts have said the same provision is indicative of a consignment. It is certain, however, that the entire contract must be considered in the light of the rights created and obligations imposed. If there is doubt as to the contract itself, then the operations thereunder are of vital importance as are also the circumstances surrounding the execution of the contract. Giving petitioners the benefit of all doubt, the language of *In re Wells,* 140 Fed. 752, 754, is appropriate:

"While, then, in some aspects the case may be a close one, it is to be remembered that *the burden is on the claimant,* and under all the circumstances does not seem to have been met."

The contracts are essentially sales, not consignments. Petitioners drafted the contracts. The opportunity was theirs to make the contract free from doubt. Considering the surrounding circumstances—the large indebtedness of Renfro-Wadenstein to petitioners, which could not be met, the serious financial condition of Renfro-Wadenstein and its inability during the entire course of its operations to pay its debts in due course of business, the knowledge of petitioners of Renfro-Wadenstein's serious plight, and of the long established practice in assigning accounts receivable—there was every reason for petitioners, if they were sincere, to draft these contracts in conformity with recognized consignment contracts. Instead, they consigned "provisionally"; imposed upon dealer all freight and carriage charges and all expenses in dealing with the merchandise; placed themselves in a position to compel

payment on demand; prevented dealer from returning the goods and securing credit therefor; vested the title to accounts receivable in dealer; and failed to reserve to themselves the right of recall of the merchandise during the term of the contract. These conditions compel the conclusion that the contracts partake of the nature of sales, not of consignments.

But if petitioners had created consignment contracts, they never acted on the contracts as such. Bills of lading, invoices, interest rate, dominion of dealer over the merchandise and accounts receivable and proceeds, all remained the same as under the "frozen credit" arrangement. Reports of sales were not made regularly, dealer fixed the retail price, intermingled the furniture with other furniture on his floor, sold the merchandise on a common bill with other furniture and on conditional sale contract if it chose. By advertising and otherwise, the public was led to believe that the merchandise was dealer's. Notes were accepted by petitioners in payment for merchandise.

The burden is on claimants and their activities under the contract added to the burden rather than sustained it.

In addition, Renfro-Wadenstein was insolvent—never had been able to pay its debts in due course of business—and petitioners well knew the situation. Petitioners wanted payment for their merchandise and their dominant idea was to enforce payment by dealer. The contracts were merely devices for the enforcement of such payments.

Irwin's contract, at any rate, executed on September 5, 1928, after all furniture was shipped, is of no effect; and would be a preference if it pertained to any furniture shipped.

Looking to the benefits accruing to petitioners and the burdens borne by dealer, and to the circumstances before and at the time of the execution of the contracts, and considering the operations under the contracts, we submit that claimants have wholly failed to sustain the burden of showing these contracts to be consignments. In any event, Irwin's contract can have no validity against the trustee.

Respectfully submitted,

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INDEX OF SUBJECT MATTER

Subject Matter	*Page of Brief*
Abbreviations	Title
Accounts Receivable	10
Assignments Of	37-41
Knowledge of Petitioners	42-43
Advertising	36
Agency	8
Argument	8
Assignment of Accounts Receivable	37-41 incl.
Bailment	22, 33, 34
Bills of Lading	31
Brief of Argument	6-8
Burden on Claimants	23, 24, 29
Carriage Charges	10, 24
"Carrying" Charge	10, 32
Conclusion	52
Conditional Sales	28, 36
Construction of Contract	23, 24
Against Parties Drafting Same	23, 24
Contingency	11, 12, 18
Contracts, Completed When	
Irwin's	47-51 incl.
Rothschild's	50, 51
Costs	51, 52
Credit, Intent to Extend	46, 47
Demand Obligation	10
Dominion Over Merchandise	32-37

Election of Consignor .....10-22 incl.
Fraud 38, 39, 42, 43
Freight 10
"Frozen Credit" 30, 31
Inherent Character of Contract..... 8
Insolvency 43-46
Knowledge of Petitioners 42, 43
Test Under State Law, Applicable 44, 45
Intent 46, 47
Interest on Funds 51, 52
Interest Rates 31, 32
Intermingling of Furniture 35, 36
Introduction to Argument 8
Invoices 31
Invoice Prices 31
Issue on Appeal 3
Knowledge of Petitioners 42, 43
Liability of Consignee 10
Notes in Payment 42
Objective Test 12, 13
Operations Under Contract .....30 et seqq.
Option of Consignor 27
Ownership, When 14, 15
Payments 42
Petitioners' Authorities 52
Practical Effect of Contracts.....8, 13, 30
Preference 50
Present Obligation of Consignee .....10 et seqq.
Principal and Factor 21, 22

Proceeds 37-42
"Provisionally" 9
Purchase, Agreement to ..... 10 et seqq.; 33
Recall of Merchandise 22-26
Reports of Sales 42
Reservation of Title 14, 15
Retail Price 32-35
Retail Sales 36
Return of Merchandise 26-29
Sale 22, 28, 36
Specification of Errors 4, 5
Statement of the Case 1-4
Statutes 28
Termination of Contracts 14
"Terms Special" 31

INDEX OF AUTHORITIES

Case and Citation. — *Page of Brief*

Adriance vs. Rutherford Mill Co., 23 N. W. 718 41
Agnew, In re, 178 Fed. 478 (D. C. Miss.) 34, 39
American Law Report, Vol. 63, P. 373n 21
Arbuckle vs. Kirkpatrick, 39 S. W. 3 22
Anderson, "Law Dictionary" 9
Aronson, In re (D. C. Mass) 245 Fed. 207 ..... 11, 14, 15
Bonnivier vs. Cole, 90 Wash. 526, 530 41
Bradford & Co. vs. U. S. Tent & Awning, 198 Ill. App. 505 19
Bradley-Alderson Co. vs. McAffee, 149 Fed. 254 ..... 8, 21, 27

Brooks vs. Parsons Co., 124 Wash. 300, 214 Pac. 6.... 45
Buffum vs. Descher, 96 N. W. 352.....20, 36
Carpenter, In re, (D. C. N. Y.) 125 Fed. 831..... 41
Chickering vs. Bastress, (Ill.) 22 N. E. 542..... 33
Climeson vs. Carson, 284 Fed. 507..... 45
Contracts, Williston 24, 49, 50
Corpus Juris, Vol. 50, 833..... 9
Davenport vs. Thompson, (Ia.) 21 N. W. 347..... 9
Davis vs. Willey, (C. C. A. 9th) 273 Fed. 397..... 45
Eichengreen, In re, (D. C. Md.) 18 Fed. 2nd 101.... 18
Eighth Avenue, In re, 82 Wash. 398, 144 Pac. 533.... 24
Ex Parte White, L. R. 6 Chan. App. 397..... 33
Fairbanks Co. vs. Graves, 90 Miss. 453, 43 Sou. 675 39
Flanders Motor Co. vs. Reed, 220 Fed. 642 (C. C. A. 1st) 15, 37, 41
Franklin vs. Stoughton Wagon Co., (C. C. A. 8th) 168 Fed. 857 .....15, 16, 24, 26
Galt, In re, (C. C. A. 7th) 120 Fed. 64.....15, 17
Garcewich, In re, 115 Fed. 87..... 15
Green vs. Tidball, 26 Wash. 338; 55 L. R. A. 879..... 19
Harris & Bacherig, In re, (Tenn. D. C.) 214 Fed. 482 .....15, 16
Highgrade Electric Store, In re, (Cal.) 3 Amer. Bkrptcy. Reports, N. S. 78.....34, 41
Jones vs. Hoquiam Lumber & Shingle Co., 98 Wash. 172; 167 Pac. 117 45
King, In re, 262 Fed. 318 (C. C. A. 9th).....24, 25
"Law Dictionary," Anderson 9

LeFlys, In re, 229 Fed. 695)C. C. A. 7th) 33
"Legal Definitions," Pope 12
Lenforth, In re, Fed. Cases, P. 369 20
Ludvigh vs. Amer. Woolen Co., 58 L. E. 345, 231 U. S. 522 15
McKay vs. Sperry Flour Co., 95 Wash. 209, 163 Pac. 377 45
McKenzie vs. Roper Wholesale Grocery Co., 70 S. E. 981 19
McKnight vs. Shadbolt, 98 Wash. 665, 168 Pac. 473.. 45
Mariash on "Sales" 9, 10, 37
Martin Vernon Music Co., In re, (D. C. Mo.) 132 Fed. 983 29
Maxwell Motor Corp. vs. Bankers Mtg. Co., 192 N. W. 19, 20 22
Meacham on "Sales", Section 43 ..... 9, 10
Miller Rubber Co. vs. Citizens Trust & Savings Bank, (C. C. A. 9th) 233 Fed. 488 ..... 32, 35, 36
Mitchell Wagon Co. vs. Poole, 235 Fed. 817 (C. C. A. 6th) 11, 14, 15, 18, 24, 32, 33
Nixon vs. Hendy Machine Wks., 51 Wash. 419, 99 Pac. 11 45
Penny & Anderson, In re, 176 Fed. 141 ..... 33, 37, 41
Peoria Mfg. Co. vs. Lyons, 153 Ill. 427, 38 N. E. 661 29
Pirie vs. Chicago Title & Trust Co., 182 U. S. 438, 45 L. E. 1171 45
Pontiac Body Co. vs. Skinner, (D. C. N. D.) 158 Fed. 858 37
Pope, "Legal Definitions" 12

Rabenau, In re, (D. C. Mo.) 118 Fed. 471 34
Reliance Shoe Co. vs. Manly, 25 Fed. 2nd 381 (C. C. A. 4th) 8, 27
Remington & Ballinger's Code, Sec. 3670 28
Remington's Compiled Statutes, Sec. 3790 28
Reynolds, In re, (D. C. Ky.) 203 Fed. 162 ..... 15, 17
Roellich, In re, (D. C. Ore.) 223 Fed. 687 18
Ronald vs. Schoenfeld, 94 Wash. 238, 162 Pac. 333 45
Sachs, In re, (C. C. A. 4th) 30 Fed. 2nd 510 33
"Sales," Mariash 9, 10, 37
"Sales," Meacham 9, 10
Samson Tire & Rubber Co. vs. Eggleston, 45 Fed. 2nd, 502, 504 (C. C. A. 5th) 30
Schultz, Trustee vs. Westco Oil Co., 149 Wash. 21, 270 Pac. 130, 63 A. L. R. 351 41
Shiffert, In re, (D. C. Pa.) 281 Fed. 284 41
Simpson vs. Western Hdwe. & Metal Co., 97 Wash. 626, 167 Pac. 113 45
Smith & Nixon Piano Co., In re, (C. C. A. 8th) 149 Fed. 111 ..... 24, 25
Statutes, R. C. S. 28
Stellwagen vs. Clum, 62 L. E. 507, 245 U. S. 605 45
Sturm vs. Boker, 37 L. E. 1093, 150 U. S. 312, 14 Sup. Ct. 99 ..... 21, 22
Sinnett vs. Watkins Co., 282 S. W. 769 19
Taylor, In re, 46 Fed. 2nd 326 ..... 26, 37
Taylor vs. Fram, (C. C. A. 2nd) 252 Fed. 465 ..... 33, 39
U. S. Electric Supply Co., In re, (D. C. Ill.) 2 Fed. 2nd 378 ..... 34, 39

Wells, In re, 140 Fed. 752.....41, 53
Weston et al. vs. Brown et al., 53 N. E. 36..... 34
Williston, "Contracts" 24, 49, 50
Wilson vs. City Bank of St. Paul, 84 U. S. 473..... 45
Yarm vs. Lieberman, 46 Fed. 2nd, 464 (D. C. N. Y.) 23
Zephyr Mercantile Co., In re, (D. C. Tex.) 203 Fed. 576 26

No. 6535

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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Bankrupts,

WALTER S. OSBORN, as Trustee in Bankruptcy for RENFRO-WADENSTEIN, a Corporation, and RENFRO-WADENSTEIN FURNITURE COMPANY, a Corporation, Bankrupts,

Appellant,

vs.

KETCHAM & ROTHSCHILD, INC., a Corporation, and ROBERT W. IRWIN COMPANY, a Corporation,

Appellees,

and

KETCHAM & ROTHSCHILD, INC., a Corporation,

Cross-Appellant,

vs.

WALTER S. OSBORN, as Trustee in Bankruptcy for RENFRO-WADENSTEIN, a Corporation, and RENFRO-WADENSTEIN FURNITURE COMPANY, a Corporation, Bankrupts,

Cross-Appellee,

and

ROBERT W. IRWIN COMPANY, a Corporation,

Cross-Appellant,

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Cross-Appellee.

UPON APPEAL AND CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORHERN DIVISION.

BRIEF OF KETCHAM & ROTHSCHILD, INC. AND ROBERT W. IRWIN COMPANY, APPELLEES AND CROSS-APPELLANTS.

POE, FALKNOR, FALKNOR & EMORY,
Solicitors for Appellees and Cross Appellants.

ACTIVE PRESS, SEATTLE

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ACTIVE PRESS . SEATTLE

INDEX TO CASES CITED

Page

*Bartling Tire Co. vs. Coxe, 288 Fed. 314.....55, 74
Benedict vs. Ratner, 268 U. S. 353, 69 L. E. 991.... 76
Berry Bros. vs. Snowden, 209 Fed. 336..... 47
*Bransford vs. Regal Shoe Co., 237 Fed. 67.....44, 46
Brinker vs. Peoples Savings Bank,
144 Wash. 93..... 64

*Eilers Music House vs. Fairbanks,
80 Wash. 379.....50, 74

Fainardi vs. Dunn, 128 Atl. 207 (R. I.)..... 76
**Franklin vs. Stoughton Wagon Co.,
168 Fed. 857.....37, 42, 44
Fogg vs. Blair, 133 U. S. 534..... 64

General Electric Co. vs. Brower, 221 Fed. 597.... 47

Haskins vs. Fidelity, etc. Bank, 93 Wash. 63..... 69
Healey vs. Boston, etc. Rubber Co., 268 Fed. 75.. 54
Hoppe vs. First National Bank of Renton,
137 Wash. 41..... 64

In re Bank of Madison, Fed. Cas. No. 890..... 74
In re Caldwell Machinery Co., 215 Fed. 428..... 47
In re Chappell, 113 Fed. 543..... 62
*In re Columbus Buggy Co., 143 Fed. 859.....39, 44
*In re Eichengreen, 18 Fed. (2nd) 101..... 37
***In re Gault, 120 Fed. 64.....37, 44, 46
*In re Harris vs. Backerig, 214 Fed. 482.....37, 44
*In re King, 262 Fed. 318.....42, 47
In re Kurtz, 125 Fed. 992..... 74
In re McGhee, 166 Fed. 928..... 74
***In re National etc. Supply Co.,
226 Fed. 840.....52, 53, 54, 55
In re Smith & Nixon Piano Co., 149 Fed. 111..... 41
In re Taft, 133 Fed. 511..... 74
In re Thomas, 231 Fed. 513..... 44
In re Walker, 235 Fed. 285..... 62
In re Weisl, 300 Fed. 635..... 52

Page

Inland Finance Co. vs. Inland Motor Car Co., 125 Wash. 301 50
International etc. Corporation vs. Sparks, 250 Fed. 318 74

Jackson vs. Sedgwick, 189 Fed. 508 76
Jordan vs. Peek, 103 Wash. 94 50

Lloyd vs. Sichler, 94 Wash. 611 64

McCallum vs. Bray-Robinson Clothing Co., 24 Fed. (2nd) 35 44
McGill vs. Commercial Credit Co., 243 Fed. 637 .. 62
M'Elwain-Barton Shoe Co. vs. Bassett, 231 Fed. 889 ..... 53, 54

Miller Lumber Co. vs. Citizens etc. Bank, 233 Fed. 488 47
***Mitchell Wagon Co. vs. Poole, 235 Fed. 817 ..... 37, 41, 44, 45

Ranson vs. Wickstrom & Co., 84 Wash. 419 50

Smith vs. National Bank of Commerce, 142 Wash. 428 64
Spiecker vs. First National Bank, 134 Wash. 280 69
Sturm vs. Boker, 150 U. S. 312, 37 L. E. 1093 37

Terhune vs. Weise, 132 Wash 208 64
Thomas vs. Field-Brundage Co., 215 Fed. 891 55

U. S. vs. State of Oklahoma, 261 U. S. 253, 67 L. E. 638 62

INDEX TO SUBJECT MATTER.

Upon Trustee's Appeal.

I.

Page

The contracts of consignment are valid ones..... 36

1. The true test of a consignment agreement is the consignor's right to request recall of consigned goods at any time, which is given by paragraph 8 of the agreement..... 36
2. Paragraph 10 of the agreement (option clause) does not render it one of sale..... 42
3. The District Court's decision is supported by:..... 46
   - A. Decisions of this court..... 46
   - B. Decisions of the State Supreme Court..... 50
4. Conduct of parties subsequent to consignment agreement was not such as to show sale..... 51
   - A. Mingling of consignee's goods with dealers' goods..... 51
   - B. Failure by consignee to comply with contract in all respects..... 52
   - C. Form of statement to consignee..... 53
   - D. Mingling proceeds of sale..... 54
5. Effect of dealer's financial condition on validity of contract..... 54

Upon Cross Appeals of Petitioners.

I.

The bills of sale..... 56

1. The Ketcham & Rothschild bill of sale..... 56
   - A. The District Court's decision overlooks the letter of March 23rd attached to contract which discloses sale was not effected until execution of bill of sale..... 56

STATEMENT.

This matter is before the court upon appeal and cross-appeals from a judgment in the United States District Court for the Western District of Washington, Northern Division, entered upon petitions in reclamation of appellees and cross-appellants. The petitions in reclamation sought recovery from the Trustee in Bankruptcy of Renfro-Wadenstein, a corporation, whose trustee is appellant and cross-appellee herein, of large shipments of furniture consigned to bankrupt by petitioners, together with unpaid accounts receivable representing furniture so consigned, together with the proceeds of the sale of said consigned furniture traceable to the Trustee. The Referee denied petitioners any relief and was, on petition for review, overruled by the District Court as respects to validity of the consignment agreements upon which the petitions were based, but was in other respects affirmed.

Hereafter in this brief, for the sake of brevity, appellee and cross-appellee, Walter S. Osborn, as Trustee in Bankruptcy for Renfro-Wadenstein, a corporation, will be be referred to as trustee, and appellees and cross-appellants, Ketcham & Rothschild, Inc., a corporation, and Robert W. Irwin Company, a corporation, will be referred to as petitioners.

The printed transcript of record was not received by petitioners until August 31st and the argument being set before this court for September

14th, petitioners' brief is necessarily being prepared and submitted without the opportunity of examining bankrupt's brief. It is believed, however, that the assignment urged by bankrupt and authorities in support thereof can be fairly accurately anticipated in this brief.

The testimony in this case was originally taken before Cicero R. Hawkins, Referee in Bankruptcy, but no decision was arrived at prior to his death and the matter was thereafter presented to Ben L. Moore, as Referee in Bankruptcy, upon the testimony so taken by Referee Hawkins. No court passing upon the issues herein involved has had the opportunity of observing the witnesses testifying and each court has rendered its decision upon the printed record alone. The testimoy introduced at the hearing before the referee was voluminous, comprising in all something in excess of six hundred typewritten pages. The parties to this appeal, conceiving that the summary of the evidence in this matter contained in the Certificate upon Review of Ben L. Moore as Referee in Bankruptcy, contained a fair and comprehensive summary of the testimony adduced, have stipulated that the summary of the evidence be considered upon this appeal to be the statement of evidence herein (Tr. p. 274 *et seq.*), and upon said stipulation an order was entered fixing the summary of evidence of said referee as a statement of evidence on appeal in this matter. (Tr. 280.)

The Petitions in Reclamation of Ketcham & Rothschild, Inc., and Robert W. Irwin Company, together with the exhibits attached to those petitions as filed, are found on page 107 *et seq.* and 138 *et seq.* of the transcript. The petition of Robert W. Irwin Company alleges that on the 1st day of April, 1928, it entered into a consignment agreement, which will be found at page 112 of the transcript, and pursuant thereto shipped to the bankrupt upon consignment quantities of furniture more particularly described in the exhibits attached to said petition.

The petition further alleges that on the 6th day of August, 1928, the bankrupt, for valuable consideration, and for the purpose of carrying out the terms and provisions of paragraph 9 of the consignment agreement, sold to the petitioner certain furniture and merchandise, executing a bill of sale therefor, the bill of sale appearing on page 117 *et seq.* of the transcription. The property covered in the bill of sale was held by the bankrupt "on consignment and under and subject to all of the terms and conditions of the contract" as provided in paragraph 9 of the consignment agreement. The prayer of the petition is for delivery of the consigned furniture in the hands of the trustee, together with any and all accounts receivable representing any of the consigned furniture which had been sold by the bankrupt or by S. T. Hills as the assignee for the benefit of its creditors and for the moneys in the hands of the bankrupt or its trustee representing

the proceeds of the sale of the consigned merchandise.

The petition in reclamation of Ketcham & Rothschild, Inc., alleges the execution of a consignment agreement on March 30th, 1928, between the petitioner and the bankrupt and the subsequent shipment of furniture to the bankrupt pursuant to the terms of said consignment agreement (Tr. p. 138 *et seq.*). It further alleges the execution of a bill of sale by the bankrupt to petitioner on the 16th day of April, 1928, covering merchandise in the hands of the bankrupt prior to the execution of the consignment contract, said bill of sale having been executed pursuant to the terms of paragraph 9 of the consignment agreement, which will be found in the transcript at page 144 *et seq.,* and which is identical in its terms with that of the Irwin consignment agreement. The filing of the bill of sale for record on April 24, 1928, is also pleaded and the same relief is asked for as in the Irwin petition. These petitions were filed on November 17th, 1928.

The trustee interposed general denials to these petitions, which will be found on page 132 *et seq.,* and page 155 *et seq.* of the transcript, and which also pleaded affirmatively the following defenses:

1. That the consignment agreements and bills of sale were fraudulent and void because:

(a) The consignment agreements and bills of sale were not recorded in the office of the

Auditor of King County as required by Remington's Compiled Statutes, Sec. 5827, requiring the recording within ten days of a bill of sale where the property is left in the possession of the vendor.

(b) That the bill of sale was, in fact, a chattel mortgage and was therefore invalid because lacking the affidavit of good faith, and the failure to record the same within ten days as required by Remington's Compiled Statutes Sec. 3780 *et. seq.*

(c) That at the time of the execution of the bill of sale the bankrupt was insolvent, which fact was known to petitioners and the bill of sale created an unlawful preference.

(d) The consignment agreements were a mere pretense, masking a conditional sale.

(e) That the consignment agreements were, in fact, a conditional sale, and not being filed within ten days after the taking of possession by the vendee were invalid.

These affirmative defenses were denied by petitioners in their replies (Tr. p. 136 *et seq.*, and p. 159 *et seq.*).

The District Court in its decision (Tr. p. 222 *et seq.*) and its order entered thereupon (Tr. p. 239 *et seq.*) held that the consignment agreements were entered into in good faith between the parties and

were valid as to all furniture shipped subsequent to April 1st, 1928, the dates of the execution thereof; that the petitioners were not entitled to recover the merchandise described in the bills of sale for the reason that the same had not been filed within ten days of the date of the sale, and further that as to the unpaid accounts receivable, representing consigned merchandise sold, and as to the proceeds thereof, petitioners had not sufficiently traced those properties into the hands of the trustee.

On October 3rd, 1928, the bankrupt made an assignment to S. T. Hills for the benefit of its creditors. The petition in bankruptcy was filed October 19th, 1928. The order of adjudication was entered on November 9th, 1928. J. L. McLean was appointed receiver on November 15th, 1928, and W. S. Osborn was elected and qualified as trustee on November 21st, 1928. (Tr. p 92, Finding 31.)

The following facts may be gleaned from the statement of evidence (Referee's summary) with reference to the

ROBERT W. IRWIN COMPANY CLAIM.

Prior to the execution of the consignment agreements, Renfro-Wadenstein, Inc., had been engaged for a number of years as a retail furniture dealer in Seattle, carrying a very high grade of merchandise. On April 4th, 1928, it moved from Fifth and Virginia Streets to its new store located at Fifth and Pine Streets, the latter move being from the out-

skirts into the very heart of the retail merchandising district in Seattle. For approximately five years prior to the filing of the petition in bankruptcy, the bankrupt had been dealing with the two petitioners, Ketcham & Rothschild, Inc., being located at Chicago, and Robert W. Irwin Company, being located at Grand Rapids, both of these concerns manufacturing upholstered furniture, bedroom furniture and dining room furniture of the very highest grade. (Tr. p. 36.) In November, 1927, the bankrupt owed each petitioner the sum of $20,000.00, which, as respects the Irwin Company, it agreed to liquidate at the rate of $2,000.00 a month, commencing in November. Two payments of $2,000.00 each, one in November and one in December, 1927, were made by the bankrupt on the Irwin indebtedness, thus reducing it to $16,000.00 at the time of the execution of the consignment agreement. (Tr. p. 3.) In March, 1928, the Irwin Company received from the bankrupt an order for $15,000.00 worth of furniture. The Irwin Company refused to accept this order until further payments had been made. (Tr. pp. 3 and 4.)

In March, 1928, prior to the execution of the consignment agreement, Mr. Irwin, president of the Irwin Company, had a conference with Mr. Jack Rothschild, president of Ketcham & Rothschild, Inc., with whom the bankrupt was also dealing and whose situation with reference to the previous extension of credit to the bankrupt was practically the same as

the Irwin Company, the conference being with reference to the bankrupt's account. (Tr. p. 4.) It was agreed at that time that Mr. Rothschild should go to Seattle and interview the bankrupt for the purpose of negotiating some arrangement, subject to Irwin's approval. It was suggested at that time by Mr. Irwin that perhaps a consignment agreement between the bankrupt and the two petitioners might prove satisfactory, and with that in mind Mr. Rothschild was furnished by Mr. Irwin with a form of consignment contract. (Tr. p. 4.)

Mr. Rothschild arrived in Seattle about March 20th, 1928, and remained there for three days, during which time, acting both for his own company and the Irwin Company, subject to the latter's approval, he negotiated with the bankrupt for some satisfactory solution of the existing condition which might permit the bankrupt to carry the goods of the two petitioners in the future. (Tr. p. 20.)

On March 27th or 28th the Irwin Company received two copies of the consignment agreement (Petitioner's Exhibit 27), together with a letter from the bankrupt dated March 23rd (Petitioner's Exhibit 26) (Tr. p. 4). When the two copies of the contract were received by Mr. Irwin they had been signed by the dealer but the date was blank and he inserted the date as April 1st, 1928, and immediately executed it upon behalf of his company. (Tr. 4.) He retained both copies of the contract in his possession until September 5th, when one con-

tract was sent back to the bankrupt. (Tr. pp. 4 and 5.)

Although the trustee has contended to the contrary, the letter of March 23rd, which modifies in certain respects paragraph 9 of the consignment agreement, was found by the referee to have been executed contemporaneously with the consignment agreement (Findings 7 to 9 inclusive, Tr. pp. 86 and 87), and this is shown conclusively by the testimony of all parties present at that time, which will be hereinafter referred to.

At the time of the execution of the consignment, the amount of Irwin Company furniture in the hands of the bankrupt was, at its invoiced price, larger in the aggregate than the indebtedness owing at that time from the bankrupt to the Irwin Company. The bankrupt had on its floors merchandise which had been previously sold it by the Irwin Company upon open account, of its Royal brand amountinp to $14,490.00 (Tr. p. 65) and in addition thereto had some of Irwin Company's Phoenix brand furniture, which had also been sold upon open account. The consignment agreement not only contemplated the shipment of furniture in the future upon consignment, but also contemplated the sale back by the bankrupt to both petitioners of merchandise of petitioners theretofore sold bankrupt and at that time on bankrupt's floors in consideration of the cancellation of the indebtedness created by the sale of

that furniture to bankrupt and the further shipment of furniture upon consignment.

This was stipulated in paragraph 9 of the consignment agreement reciting that the bankrupt had in its possession certain merchandise "as per an attached list" which had theretofore been sold and delivered to the bankrupt by the petitioner on credit and had not been paid for and that the title to said previously sold merchandise "is hereby transferred and conveyed back" to the petitioner and should thereafter be treated as on consignment and subject to all of the terms and conditions of the consignment agreement. (Tr. p. 5.) The same paragraph further provided that the Irwin Company thereby cancelled the indebtedness of the bankrupt for said previously sold goods.

It was to amend this paragraph of the consignment agreement that the letter of March 23rd was drafted (Petitioner's Exhibit 26). As appears from its terms, it modifies the provisions of paragraph 9, which assume a sale *in praesenti* and calls for a transfer back of the merchandise of petitioner upon bankrupt's floor after that merchandise had been ascertained by the furnishing of an inventory to petitioner. That letter reads as follows:

> "Referring to the *attached* memorandum of agreement:
>
> It is our understanding that we are to furnish, shortly after the first of the month, an inventory of all of your merchandise on hand;

> That we also are to furnish bill of sale *which will act as a transfer back* to your Company of this merchandise, and that any difference in the amount of the account will be taken care of in three (3) equal payments, thirty, sixty and ninety days.
>
> This refers in particular to paragraph number nine." (Italics supplied.)

This letter was written by the bankrupt at the instance of Mr. Rothschild and was signed contemporaneously with the consignment agreement. (Tr. p. 20.) As is inferred from this letter, no list of the merchandise to be transferred back to the petitioner was attached to the consignment agreement. As a matter of fact, the parties at that time had not come to a meeting of minds as to just what furniture was to be transferred back by the bankrupt to the Irwin Company.

Between April 1st, 1928, the date of the Irwin consignment agreement, and August 6th, 1928, the date of the bill of sale to the Irwin Company, correspondence was taking place between the bankrupt and the Irwin Company in an endeavor to get a bill of sale which would contain a correct list of the merchandise which the Irwin Company would be willing to take back. (Tr. pp. 6 to 10 inclusive.) By reason of the fact that at the time of the execution of the consignment agreement the bankrupt had more Irwin Company furniture on its floor than the amount of its indebtedness to the Irwin Company, the latter did not desire to take back all of its mer-

chandise because that would have put the bankrupt in the position of being the creditor of the Irwin Company.

On April 28th the bankrupt sent the Irwin Company a bill of sale, which included all of the Irwin furniture on the bankrupt's floor. (Tr. p. 6.) On May 4th Irwin wrote the bankrupt stating that a transfer back of all the furniture would not be satisfactory and suggesting that the bankrupt retain title to all of its Phoenix merchandise, executing a bill of sale for so much of its Royal merchandise as would still leave a balance owing to the Irwin Company, which balance was to be taken care of in cash payments by the bankrupt. (Tr. p. 6.) On May 22nd the bankrupt sent the Irwin Company notes for the Phoenix merchandise, which line was not included in the bill of sale, and on June 4th petitioner wrote the bankrupt that the notes were satisfactory but that "the bill of sale of the Royal goods should be reduced to represent the amount of this debit balance, after deducting these two notes," and that "We cannot see our way clear to take back title to more of the Royal merchandise than this account represents." (Tr. p. 7.) It was further there stated, "We are enclosing herewith a list of items amounting to $14,490.45, which we suggest you convey to us by the bill of sale and this will clear the records under the new arrangement." (Tr. p. 7.)

On July 24th the petitioner wrote the bankrupt complaining that the bill of sale had not been sent in

accordance with the agreement. (Tr. pp. 7 and 8.) On August 4th the bankrupt sent the Irwin Company a letter enclosing a report of sales with two notes to cover the goods sold. This was the only time the bankrupt reported a sale of goods under the consignment agreement to the Irwin Company. (Tr. p. 8.) However, on August 11th the Irwin Company wrote the bankrupt acknowledging receipt of its report of August 4th but calling to the bankrupt's attention the fact that the settlement should be by cash and not by notes, and stating that in that particular instance they would be willing to accept a note settlement. (Tr. pp. 8 and 9.) On August 24th the bankrupt sent the petitioner an inventory of the Irwin Company merchandise on the bankrupt's floor as of July 28th. On September 5th the petitioner acknowledged receipt from the bankrupt of the bill of sale of Royal goods and returned to the bankrupt the consignment agreement which had previously been executed on April 1st, 1928. (Tr. p. 9.) Between April 1st, the date of the execution of the Irwin consignment agreement, and August 6th, the date of the execution of the bill of sale, the Irwin Company and the bankrupt had been operating under the consignment agreement, although as respects the items to be contained in the bill of sale, they were not agreed to until August 6th. (Tr. p. 10.)

If the bankrupt had not executed the consignment agreement and the bill of sale, or, in the al-

ternative, paid what was due on the old account, the Irwin Company would not have shipped it any more furniture. (Tr. p. 11.) Exhibits 55 and 56 attached to the deposition of Robert W. Irwin are duplicates of the invoices of goods shipped by petitioner to bankrupt subsequent to April 1st, 1928, the date of the execution of the consignment agreements and the amount of the shipments subsequent to September 27th by the petitioner to the bankrupt are set forth at page 11 of the transcript.

Mr. Irwin relied upon the bankrupt's financial condition as disclosed by the financial report dated January 1st, 1928, being Exhibit 18a attached to Mr. Irwin's deposition (Tr. p. 11) and, to use his words, "I relied on those representations as to the financial condition of that company. If I had had knowledge that they were in a bad way financially I would not have entertained the execution of the agreement which was made on April 1, 1928." (Tr. pp. 11 and 12.)

Mr. Irwin further testified:

> "I was not concerned about the financial condition of the dealer until I had notice of their putting Mr. Hill in as assignee. At the time we entered into the proposed agreement of April 1, 1928, I knew that they did not have a sufficient amount of money to operate upon the scale upon which they were operating and pay their bills promptly but I had no thought that they were in danger of failure." (Tr. pp. 12 and 13.)

The consideration for the consignment agreement of April 1st, 1928, was that the Irwin Company would continue to ship more goods. They were unwilling to ship more goods on open account but there was no intent on the part of the Irwin Company by the acceptance of the bill of sale or by the execution of the consignment agreement to prefer itself over other creditors of the bankrupt. (Tr. p. 13.)

While the consignment contract provided that the accounts receivable, representing consigned merchandise sold, were to remain the property of petitioner until remittance therefor should have been made to the petitioner or consignor, (see par. 10 of the consignment agreement, Exhibit 27), the dealer had made a practice of discounting its accounts receivable with three finance houses in the City of Seattle. With reference to this practice of discounting Mr. Irwin testified:

> "My company did not at any time authorize the dealer to assign or pledge any accounts representing any goods covered under the agreement of April 1st which were shipped after the agreement was executed, neither did we authorize the dealer to sell any of the accounts receivable representing the goods sold by the dealer which had been obtained from us under the April 1st agreement. We had no knowledge that the dealer was pledging these accounts receivable representing furniture sold by them which had been shipped to them by us subsequent to the execution of the agreement. Prior to April 1, 1928, I had knowledge that the dealer

had a practice of pledging its account receivable. I obtained that information from M. Wadenstein when he was in Grand Rapids in November, 1927. Analyzing his statement, I noticed something in the statement that made me ask him the question and I developed the information from him that they were pledging their accounts receivable. * * * To provide against that practice a paragraph was inserted in the agreement of April 1st because of the knowledge I had of the practice he had been pursuing." (Tr. pp. 15 and 16.)

Paragraph 2 of the consignment agreements provides in part that the consignee "shall hold said goods exclusively for the purpose of resale for the account of said party of the first part at prices not less than the net invoice price;" and paragraph 3 states "party of the second part shall be entitled to retain by way of commission on sales made the surplus obtained and collected by it on the sale of specific items over and above the invoice price thereof."

Mr. Irwin testified that he did not at any time instruct the bankrupt as to the price at which the merchandise was to be sold other than it was not to be sold at less than the invoice price. (Tr. p. 16.) He further testified that no provision was made for keeping the consigned furniture separate and apart from the remainder of the goods on the bankrupt's floor; "it would have to be intermingled with other merchandise sent to them from other concerns in order to make the best display for sale." (Tr. p. 17.)

That the consignment agreement was a *bona fide* arrangement is evidenced by the method in which the books of the parties were kept after its execution. The Irwin Company had on their books a "special discount" for designating the goods which were shipped under the consignment agreement. (Tr. p. 16.) At the time of the receipt of the bill of sale by the Irwin Company, the indebtedness created by the previous sale of merchandise contained in the bill of sale was also cancelled on the books of the Irwin Company, the merchandise described in the bill of sale being at that time transferred from the Renfro-Wadenstein account to the new special account. (Tr. p. 16.)

The bankrupt's method of handling consigned furniture shows the same scrupulous care. Mr. Wadenstein testified:

> "After the execution of the consignment agreement subsequent shipments of merchandise by these two concerns were never carried on our books, they were treated as special invoices and placed in a folder which was marked "consignment.' After the merchandise was sold it was billed to us and then put on the books as a direct obligation of our corporation. Our books indicate a charging off of the old indebtedness to the two petitioners after the consignment agreement. The approximate date of that charging off on our books was late in April, 1928." (Tr. p. 48.)

And he further testified:

> "At the time of the consignment agreement the goods which had been previously shipped by

the two petitioners were carried on our books as having been sold to my concern on open account. After, or at the time of the execution of the consignment agreement those goods were charged back to these respective factories and then carried in our consignment folder." (Tr. p. 49.)

He further testified:

"The shipments made by the Irwin Company after April 1, 1928, were made pursuant to the consignment arrangement and the same was the case with Ketcham & Rothschild." (Tr. p. 48.)

The statement which we have just given with reference to the facts concerned in the Irwin claim might well be supplemented by the examination of the numerous letters passing between the bankrupt and the Irwin Company from the date of the execution of the consignment agreement to the assignment for the benefit of creditors of the bankrupt in October, 1928. These letters are all attached as exhibits to the deposition of Robert W. Irwin and the necessity of keeping this brief within reasonable confines prevents more than a reference to them here. It will suffice to say that these letters contain a full and frank discussion by the parties to the consignment agreement with reference to their mutual rights at a time when there was no hint in the mind of petitioner that occasion would ever arise that the validity of the consignment agreement might be questioned. This correspondence bespeaks a guilelessness entirely foreign to the trustee's contention that this contract was but a cloak for a sale and dis-

closes that the parties all along were acting under the belief that their arrangement was one of consignment and not sale. The letters are as follows:*

Bankrupt's letter of March 6th containing financial statement. (Irwin's Exhibit 18.)

Irwin's letter of March 30th reminding bankrupt of its duty to prepare a bill of sale in accordance with the contract. (Irwin's Exhibit 29.)

Bankrupt's letter dated April 5th wherein the latter promises to prepare an inventory and bill of sale "within the next few days." (Irwin's Exhibit 32.)

Bankrupt's letter of April 28th enclosing inventory or bill of sale of goods. (Irwin's Exhibit 36.)

Irwin's letter of May 4th complaining that the bill of sale previously sent covered all of its merchandise on bankrupt's floor and was not in accordance with the agreement. (Irwin's Exhibit 38.)

Wire from Bankrupt dated May 27th explaining execution of bill of sale delayed pending correspondence with Mr. Rothschild as to agreement between bankrupt and Rothschild. (Irwin's Exhibit 39.)

Bankrupt's letter of May 22nd explaining and enclosing correspondence with Mr. Rothschild with reference to agreement as respected Irwin furniture. (Irwin's Exhibit 40.)

Irwin's letter dated June 4th sending to bankrupt items to be included in bill of sale. (Irwin's Exhibit 43.)

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* The exhibits referred to on this and pages immediately succeeding will be found attached to deposition of Robert W. Irwin.

Irwin's letter of July 24th complaining of bankrupt's failure to send bill of sale as required by agreement and to report sales and settlements. (Irwin's Exhibit 46.)

Bankrupt's letter of July 28th excusing failure to prepare bill of sale and submitting reports. (Irwin's Exhibit 47.)

Bankrupt's letter of August 4th enclosing report of sale and notes. (Irwin's Exhibit 48.)

Irwin's letter of August 11th complaining that bankrupt settled for consigned goods sold by it in notes instead of cash as required by the consignment agreement. (Irwin's Exhibit 49.)

Bankrupt's letter of August 24th enclosing bill of sale. (Irwin's Exhibit 50.)

Irwin's letter of September 7th sent but a few weeks before bankrupt's failure wherein Irwin calls upon bankrupt to comply with the insurance clause of the contract. (Irwin's Exhibit 52.)

The referee found (and the figures hereinafter referred to are supported by the stipulation as to amount of consigned furniture—Tr. pp. 70 and 71—and the testimony of Herbert E. Smith—Tr. pp. 65 to 67), that the amount of furniture of the Irwin Company in the hands of the trustee in bankruptcy was $18,739.50, which included:

(a) Furniture shipped subsequent to the consignment agreement, $10,348.50;

(b) Furniture included in bill of sale, $8,391.00.

The referee further found that the trustee in bankruptcy received contracts and accounts re-

ceivable representing Irwin consignment goods (including both goods described in the bill of sale and goods shipped subsequent to the consignment agreement) amounting to $1,725.00. These receivables were not collected prior to bankruptcy.

The referee further found (Finding 33, Tr. p. 94) that Mr. Hills as assignee:

(a) Received payments on Irwin furniture, including that described in bill of sale and shipped subsequent to consignment agreement, sold by bankrupt prior to the assignment for the benefit of creditors in the sum of $425.67; and

(b) Himself sold Irwin consignment furniture, including that covered by a bill of sale and that shipped subsequent to the consignment agreement, for which there was collected by the assignor, receiver and trustee the sum of $2,062.

The exhibits introduced herein disclose what proportions of the accounts receivable and proceeds of the sale of merchandise above referred to are attributable to merchandise described in the bill of sale and what proportion to merchandise shipped subsequent to the consignment agreement.

We now advert to the facts involved in

KETCHAM & ROTHSCHILD, INC., CLAIM.

At the time of the execution of the consignment agreement the bankrupt owed Ketcham & Rothschild $17,000.00 for merchandise previously sold on

open account. This account was at that time covered by notes. (Tr. pp. 18 and 19.) This credit had prior to the consignment agreement been extended under what Mr. Rothschild called a "frozen credit arrangement," which was, briefly, as stated in petitioner's letter of March 22nd, 1927:

> "We suggest as a credit arrangement that we grant you a standing credit of whatever sum you may have invested in samples of our goods, up to $15,000, you to pay interest at the rate of 7% for the use of this credit; the amount of interest due to be determined and payable at each inventory time. We would want to have the right of closing this special credit at any time by giving you notice in writing, in which case the credit granted for sample purposes would become due for payment net, one year from the time of such notice, interest ceasing from the time of our giving notice. In addition to the credit above suggested we would make the terms for your further purchases subject to terms 2%—30 days, net 60 days, with a 30 day dating." (Tr. p. 28.)

There had been some doubt in Mr. Rothschild's mind prior to October 19th, 1927, whether the bankrupt was purchasing on this frozen credit arrangement but at that time he was definitely advised that the bankrupt was expecting to take advantage of this arrangement. The frozen credit arrangement was terminated on Mr. Rothschild's arrival in Seattle in March, 1928, and before the execution of the consignment agreement. (Tr. p. 29.)

The consignment agreement and the letters of March 23rd (both of which were identical in lan-

guage with the agreement and letter of the same date involved in the Irwin claim) were both signed by Mr. Wadenstein as president of the Renfro-Wadenstein Company on March 23rd contemporaneously. (Tr. p. 20.) Duplicate contracts were taken back to Chicago by Mr. Rothschild and were there signed by his firm on March 30th. (Tr. p. 20.) At the time of the execution of the consignment agreement, Mr. Rothschild did not know how much of his concern's furniture was on the bankrupt's floor. No list of his firm's items of furniture was given him while he was in Seattle, only approximate figures. (Tr. pp. 20 and 21.) The bill of sale (Ketcham & Rothschild, Exhibit 2) was executed April 16th and forwarded by the bankrupt to petitioner and filed for record in the office of the Auditor of King County, Washington, on April 24th, 1928. (Tr. p. 21.) The bill of sale included merchandise which had previously been shipped by Ketcham & Rothschild to the bankrupt prior to the date of the execution of the consignment agreement in the amount of $11,585.25.

Here, as in the case of the Irwin transaction, the books of account of the petitioner and the entries made therein shortly after the execution of the consignment agreement are inconsistent with any conclusion other than that the consignment agreement and bill of sale given pursuant thereto were *bona fide* and above board.

Petitioner's Exhibit 3 contains copies of the invoices covering goods shipped by the petitioner to the bankrupt subsequent to the consignment agreement. They are all marked "terms special," which meant, according to Mr. Rothschild, "We adopted this designation on our invoices 'Terms special' to indicate a consignment arrangement in accordance with the consignment contract." (Tr. p. 30.)

Petitioner's Exhibit 6 is a photostatic copy of one of Ketcham & Rothschild's books of account disclosing an entry as of April 27th, 1928, showing that the bills receivable account was credited with the sum of $11,695.00, being the amount of furniture contained in the bill of sale. The notation reads:

> "Merchandise returned
> To bills receivable
> To received merchandise covered by bill of sale for Renfro-Wadenstein per their statement of April 27th, 1928, excluding items covered by our consignment of April 2nd and April 7th, 1928, still unsold."

Petitioner Ketcham & Rothschild's Exhibit 7 is a photostatic copy from the petitioner's bills receivable ledger disclosing that on April 30th, 1928, the bills receivable account was credited with the $11,695.00 of merchandise contained in the bill of sale.

Petitioner Ketcham & Rothschild's Exhibit 8 is another photostatic copy from the bills receivable records of the petitioner showing that on April 27th,

1928, the notes which had been previously given by the bankrupt for the goods included in the bill of sale were marked "Settled for."

Petitioner Ketcham & Rothschild's Exhibit 9 is a photostatic copy from the consignment sales record of the petitioner showing that on April 27th, 1928, the $11,695.00 worth of merchandise contained in the bill of sale was credited to the petitioner's consignment sales account, and that other shipments made thereafter by the petitioner to the bankrupt were noted on that account.

Petitioner Ketcham & Rothschild's Exhibit 10 is a photostatic copy from the records of the petitioner bearing out the *bona fides* of this transaction.

Petitioner Ketcham & Rothschild's Exhibit 11 shows that on July 31st, 1928, and June 30th, 1928, direct charges were made by the petitioner to the bankrupt of items covered by the consignment agreement which the bankrupt had previously reported sold.

Petitioner Ketcham & Rothschild's Exhibit 12 is another photostatic copy from the records of the petitioner showing that a Renfro-Wadenstein special account was carried by the petitioner, in which all of the consignment shipments, as well as the merchandise covered in the bill of sale, were reflected.

These book entries cannot be denominated self-serving. They were made at a time when no one

anticipated that the validity of either the contract or the bill of sale would be questioned.

Mr. Rothschild was of the opinion that the bankrupt was solvent at the time of entering into the consignment agreement.

> "From the local inquiries which I made I considered that with the assistance of factories like Mr. Irwin's and our own, and the equity they had in the business they had a good chance of becoming a very good firm." (Tr. p. 23.)

At no time was petitioner cognizant of bankrupt's practice of assigning and pledging accounts receivable representing consigned furniture contrary to paragraph 10 of the consignment agreement providing:

> "The consigned goods or the accounts representing the same and the proceeds thereof shall continue to belong to and be the property of the party of the first part until remittance therefor shall have been made to and received by said party of the first part as herein provided."

He testified:

> "While I was aware of the fact that Renfro-Wadenstein were in the habit of borrowing on their bills receivable I could not see what bearing that had on any merchandise we had out there that belonged to us, that they could not borrow on any more than I could on this Smith Building. My letter means that they were borrowing on their accounts receivable but ours was not one of their accounts receivable." (Tr. pp. 31 and 32.)

The testimony further discloses that the bankrupt paid for all consigned merchandise of petitioner reported sold by paying cash therefor, save for one payment which was made by note (Tr. p. 34), and that the petitioner never at any time sought to hold the bankrupt for the invoice price of the goods which were left on consignment but which had not been sold by bankrupt. (Tr. p. 34.)

Mr. Wadnestein expressly testified that as respects both petitioners and the date of execution of the consignment agreement, they were working under the consignment agreement both as regards furniture shipped subsequent to the consignment agreement and the merchandise included in the bill of sale. (Tr. pp. 48, 49 and 57.)

He further testified that the discount companies with whom the accounts receivable in question had been pledged, to-wit, Seattle Discount Corporation, Sunnyside Finance Company and General Discount Corporation, were advised by him after the execution of the consignment agreement as to the fact of its execution. (Tr. p. 58.) The collections on the accounts assigned to the finance houses were made by the bankrupt. The finance houses did not bill the bankrupt's customers on the assigned accounts, nor did they notify the customers of the assignment. The bankrupt's collections on the assigned accounts were placed in its general funds and remittances were made to the finance houses on an average of twice a month. (Tr. p. 58.)

As was the case with the petitioner Irwin Company, the correspondence between Ketcham & Rothschild, Inc., and the bankrupt shows that the former was at all times insisting that the bankrupt live up to the consignment agreement. We here summarize this correspondence:

Petitioner's letter of March 30th returning the consignment agreement to bankrupt; bankrupt is requested to prepare bill of sale in accodrance with agreement. (K&R's Exhibit 13.)

Petitioner's letter of April 18th complaining of not having received remittance in accordance with contract. (K&R's Exhibit 15.)

Petitioner's letter of May 29th requesting bankrupt to see that future statements and remittances are sent in accordance with agreement. (K&R's Exhibit 19.)

Petitioner's letter of June 26th complaining of not receiving remittance due June 20th. (K&R's Exhibit 23.)

Petitioner's letter of June 29th requesting cash settlements and not notes in accordance with agreement. (K&R's Exhibit 25.)

Petitioner's letter of August 2nd stating remittances have not been made to cover direct charges in accordance with agreement. (K&R's Exhibit 31.)

Petitioner's letter of August 28th complaining contract not complied with by making a remittance for goods sold and requesting that contract be lived up to with respect to assigning of petitioner's accounts. (K&R's Exhibit 36.)

The referee found (and this is supported by the testimony of Herbert E. Smith (Tr. p. 67 *et seq.*)

that there came into the hands of the trustee in bankruptcy $9,984.31 of Ketcham & Rothschild's consigned furniture, which included:

(a) Furniture described in bill of sale to Ketcham & Rothschild, $5,751.75;

(b) Furniture shipped by Ketcham & Rothschild subsequent to the consignment agreement, $4,232.56. (Tr. p. 95, Finding 34.)

The referee further found that there came into the hands of the trustee in bankruptcy contracts and accounts receivable representing Ketcham & Rothschild consignment furniture, including both goods described in the bill of sale and goods shipped subsequent to the consignment agreement, amounting to $2,021.00, and that these contracts and accounts had not been collected prior to the bankruptcy proceeding (Tr. pp. 95 and 96).

The referee further found that S. T. Hills as assignee for the benefit of the creditors of the bankrupt received payments on consigned furniture (including that described in the bill of sale and shipped subsequent to consignment agreement) sold by bankrupt prior to the assignment for the benefit of creditors in the sum of $568.75, and further sold Ketcham & Rothschild furniture included in the bill of sale, for which there was collected by the assignee, receiver and trustee the sum of $1,593.50. (Tr. p. 96.)

The referee further found that Mr. Hill as assignee turned over to Mr. McLean as receiver

$2,935.88 (Tr. p. 96, Finding 36), and the report of Mr. McLean as receiver shows that he turned over to the trustee in bankruptcy $5,321.22 in cash. (Tr. p. 75.)

ASSIGNMENTS OF ERROR OF CROSS-APPELLANT ROBERT W. IRWIN COMPANY.

I.

The District Court erred in failing to grant in its entirety the petition in reclamation of Robert W. Irwin Company.

II.

The District Court erred in holding that the bill of sale from Renfro-Wadnestein to Robert W. Irwin Company, dated August 6th, 1928, did not effectively pass title to the merchandise therein described to petitioner.

III.

The District Court erred in ruling that the bill of sale from Renfro-Wadnestein to Robert W. Irwin Company, dated August 6th, 1928, was invalid.

IV.

The District Court erred in failing to find there was a sufficient transfer of the merchandise described in the bill of sale of August 6th, 1928, from the possession of Renfro-Wadenstein as owner to Renfro-Wadnestein as bailee to render inapplicable

the statute requiring bills of sale to be recorded within ten days where the property is left with the vendor.

V.

The District Court erred in failing to find that Renfro-Wadenstein was not insolvent at the time of the execution of the consignment contract and of the bill of sale.

VI.

The District Court erred in failing to find that the bill of sale was executed for a valid, present consideration and was not a preference.

VII.

The District Court erred in failing to find that Robert W. Irwin Company was entitled to the immediate possession of all accounts receivable in the hands of the trustee unpaid by customers of the bankrupt, said accounts receivable representing furniture sold both by bankrupt and by its assignee, said furniture being covered both by said bill of sale and by said consignment agreement.

VIII.

The District Court erred in failing to find and order that Robert W. Irwin Company was entitled to the immediate possession of moneys collected by Renfro-Wadenstein and by S. T. Hills as assignee, said moneys being collections on accounts representing furniture sold, said furniture being cov-

ered both by said bill of sale and said consignment agreement.

IX.

The District Court erred in failing to find that the contracts and accounts receivable of Renfro-Wadenstein, owned by Robert W. Irwin Company, were negotiated to the discount companies by Renfro-Wadnestein without the knowledge or approval of Robert W. Irwin Company.

X.

The District Court erred in refusing to allow Robert W. Irwin Company its costs and attorneys' fees as prayed for.

ASSIGNMENTS OF ERROR OF CROSS-APPELLANT, KETCHAM & ROTHSCHILD, INC.

I.

The District Court erred in failing to grant in its entirety the petition in reclamation of Ketcham & Rothschild, Inc., a corporation.

II.

The District Court erred in holding and finding that the sale of the merchandise included in the bill of sale to Ketcham & Rothschild, executed April 16th, 1928, was completed on March 30th, the date of the execution of the consignment agreement.

III.

The District Court erred in holding that the bill of sale to Ketcham & Rothschild from the bankrupt, executed April 16th, 1928, was not timely recorded under Remington's Compiled Statutes, Sec. 5827.

IV.

The District Court erred in failing to find that Ketcham & Rothschild was entitled to the merchandise described and set forth in the bill of sale executed April 16th, 1928.

V.

The District Court erred in failing to find that said bill of sale was executed for a present and valid consideration and as such did not constitute a preference.

VI.

The District Court erred in failing to find that said bankrupt was not at the time of the execution of said consignment agreement and at the time of said bill of sale insolvent.

VII.

The District Court erred in failing to find that Ketcham & Rothschild was entitled to the immediate possession of the cash and moneys, being the proceeds of the sale of certain furniture sold by the bankrupt and S. T. Hills as assignee, which furni-

ture was covered by the consignment agreement and the bill of sale, which moneys were in the possession of the trustee at the time of the filing of the petition in reclamation.

VIII.

The District Court erred in failing to find that Ketcham & Rothschild was entitled to the immediate possession of all accounts receivable in the hands of the trustee which were unpaid by the customers of Renfro-Wadenstein, such accounts receivable being covered both by the bill of sale and by said consignment agreement.

IX.

The District Court erred in failing to find that the contracts and accounts receivable of Renfro-Wadenstein, owned by the petitioner, were negotiated to the discount corporations without the knowledge or consent of Ketcham & Rothschild.

X.

The District Court erred in refusing to allow Ketcham & Rothschild its costs and attorneys' fees as prayed for.

It will be necessary to consolidate in this brief the argument both on the appeal of the trustee in bankruptcy and upon the cross-appeals of the petitioners in reclamation. The argument upon the trustee's appeal and upon the cross-appeals of the petitioners in reclamation will be presented in such

a manner as to conform to the outline contained in the index to subject matter found at the front of this brief.

ARGUMENT UPON TRUSTEE'S APPEAL.

I. The contracts of consignment are valid ones.

1. The true test of a consignment agreement is the consignor's right to demand recall of consigned goods at any time, which right is given by paragraph 8 of the agreement.
The Trial Court in its decision said:

> "I have no doubt that the intent of the parties was in good faith to ship future merchandise on consignment, no present liability by the bankrupt was made, or right created to petitioner." (Tr. p. 237.)

The District Court further found (Tr. p. 237):

> "The petitioners, as the testimony discloses, had confidence in the bankrupts and 'felt justified in backing them with merchandise to the extent of their new enterprise.' "

Nowhere in the contract do we find any agreement on the part of the bankrupt to purchase. No terms importing sale are implied. Its provisions are only consistent with the finding that the goods shipped under this agreement were to be held by the dealer for the purpose of sale as agent and for the account of the several petitioners. The provisions of the contract requiring insurance in the name of the consignor (par. 2), merchandise to be held for the account of the consignor and sold at not less than invoiced price (par. 2), an itemized

record of sales to be kept and reported to consignor at stated intervals (par. 4), remission of moneys collected to be made at stated intervals (par. 5) and reservation of right by consignor to recall goods (par. 8), are all provisions which indelibly stamp this agreement as one of consignment.

Running throughout all of the cases bearing upon the validity of the consignment agreement will be found expressed the test: Can the consignor under the terms of the contract compel a return of the goods not sold?

In *Sturm vs. Boker,* 150 U. S. 312, 37 L. E. 1093, it was said:

> "The power to request the restoration of the subject of the agreement is an indelible incident of a contract of bailment."

To the same effect are:

In re Eichengreen, 18 Fed. (2nd) 101, (5th C. C. A.).
Mitchell Wagon Co. vs. Poole, 235 Fed. 817 (6th C. C. A. 1916).
In re Galt, 122 Fed. 64 (7th C. C. A. 1903).
In re Harris vs. Bacherig, 214 Fed. 482 (D. C. Tenn. 1913).
Franklin vs. Stoughton Wagon Co., 168 Fed. 857 (8th C. C. A. 1909).

It was said in *Mitchell Wagon Co. vs. Poole, supra:*

> "It may not be amiss, however, to quote from the opinions in them as to the test of determining whether a given contract is a sale or an agency to sell. In the *Galt* case Judge Jenkins said:

'In a bailment the bailor may require the restoration of the thing bailed, and in a sale, whether absolute or conditional, there must be an agreement, express or implied, to pay the purchase price of the thing sold.' "

In the *Flanders* case, he said:

'The rule by which to distinguish between a bailment and a conditional sale we consider as decided in the case of *In re Galt,* 120 Fed. 64 (56 C. C. A. 470). We there held that, if the sender has a right to compel return of the thing sent, it is a bailment, and not a (conditional) sale, and that in a sale there must be an agreement, express or implied, to pay the purchase price.'

In the *John Deere Plow Co.* case, Judge Riner said:

'The plow company had the right, under the contract, to require the goods returned, and in this it lacks one of the necessary elements of a contract of sale, namely, to pay money, or its equivalent, for the goods delivered, with no obligation to return.'

In the *Columbus Buggy Co.* case, Judge Sanborn said:

'The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment.'

In the *Stoughton Wagon Co. case,* Judge Riner said:

'We think the wagon company retained full control of the disposition to be made of the wagons, in that it could direct the goods returned to the house and shipped elsewhere as desired, and in this it lacks one of the necessary elements of a contract of sale, namely, to pay money or its equivalent for the goods delivered with no obligation to return.' "

The District Court in its decision recognized this rule in stating, "The power to repossess the specific merchandise is an incident to bailment. In *re Columbus Buggy Co.,* 143 Fed. 859. *This right is in the contract,"* (Tr. p. 236.)

The referee in his decision, while recognizing that the consignor's right of recall is the controlling test (Tr. p. 204), held that that right was not given the consignor under the instant contract. (Tr. p. 205.) The logic employed was:

Paragraph 8 of the agreement states "in case any of said goods shall *at any time* be recalled by said party of the first part, the party of the second part shall crate and place on cars at Seattle."

Paragraph 10 provides "In the event party of the first part shall not elect to sell said goods to party of the second part, then upon termination of the contract it shall be the duty of party of the second part to crate and place on cars at Seattle unless otherwise directed by party of the first part."

The referee's conclusion was that the right of recall given by paragraph 8 with its attendant duty on the part of the consignee of crating and placing merchandise on cars at Seattle, prescribed the duties of the consignee and the rights of the consignor *only* in event the consignor terminated the contract as provided in the first subdivision of paragraph 10. The referee's reasoning anticipates the argument that this construction will make of paragraph

8 a mere nullity in view of the provisions in paragraph 10, but meets this by saying that if paragraph 8 confers a right of recall at any time, then that portion of paragraph 10 directing the consignee to crate and place the goods on cars upon termination of the contract adds no rights to and is repetitious of paragraph 8.

It is obvious, however, that paragraphs 8 and 10 pertain to different matters. Paragraph 8 assumes *"the right of recall at any time."* Paragraph 10 makes no reference to the consignor's right of recall and is not repetitious to that extent. It casts the duty upon the consignee of crating and placing the goods on cars, not in case of recall, but only in the event that "party of the first part shall not elect to sell said goods to party of the second part" upon termination of the contract. The referee's construction leaves the words "at any time" completely out of paragraph 8. The drafter of the contract intended to cast upon the consignee the duty of returning the goods at the termination of the contract whether or not demand for recall was made. The referee stated in his decision:

> "If the last named paragraph (par. 8) stood alone, it could be said with much force that its terms presuppose a right to recall at any time, and where such a right is necessarily presupposed, it is, in legal effect, granted." (Tr. pp. 204 and 205.)

This is without doubt a correct statement of the law.

In *Mitchell Wagon Co. vs. Poole, supra,* the contract did not specifically provide that the consignor would be entitled to recall the goods at any time. However, the court assumed the existence of such a right from the provision in the contract that the bankrupt should be entitled to reimbursement for freight and drayage paid out by him if the consignor should order the wagons reshipped or turned over to other parties. The court there said:

> "This follows from the fact that there is no agreement on the part of the bankrupt to pay the prices fixed for the wagons—it was not contemplated that he should pay for them except upon his becoming a purchaser in one of the contingencies named—and that the appellant had the right to demand a return of the wagons at any time. * * * The existence of such a right is to be gathered from the provision that the bankrupt would be entitled to reimbursement for freight and drayage paid out by him if appellant should order the wagons reshipped or turned over to other parties when he had complied with the terms of the contract, but not if appellant concluded it wanted possession because of any violation thereof, to which the provision the bankrupt was to pay all expenses until the wagons were sold or 'ordered away' looked. *This provision rather presupposes that the bankrupt had such right than confers it. But that which is presupposed by a contract is as much a part of it as that which is expressly provided for therein.* This provision may be thought to be a harsh one. But there is no gainsaying that it is there."

The same thing was held in *In re Smith & Nixon Piano Company,* 149 Fed. 111, where the

court assumed the right to demand recall from the fact that the title had been reserved in the consignor. It was there said:

> "While there was no express reservation by the piano company of dominion over the pianos before they were sold, such dominion nevertheless existed as a natural incident to a title it had not parted with. We start with title in the piano company, and unless an intention that it pass to another can be discovered it remains where it was with all appurtenant rights."

This court, *In re King,* 262 Fed. 318, had before it the same question and said:

> "The fact that there was no express agreement that the title to the property delivered by the Empire Company to King should remain in the former, nor for the return by King of such portion of it as remained unsold by him to the consignor, does not show, nor, indeed, tend to show, that the transaction between the parties was anything more than the ordinary one of the consignment of personality for sale, unattended, as it was, by any positive act of the consignor that can be properly held to have enabled the consignee to commit any fraud upon the public."

See also *Franklin vs. Stoughton Wagon Co.,* 168 Fed. 857 (8th C. C. A. 1909).

2. Paragraph 10 of the Agreement (Option Clause) Does Not Render It One of Sale.

Paragraph 10 of the consignment agreement reads:

> "This contract shall continue in force and effect until terminated by one or both of the

parties hereto by written notice given to the other, but in case of such termination party of the first part shall have the right at its option to require party of the second part to keep and pay for the consigned goods then remaining on hand at the invoiced price thereof. Party of the second part to be entitled to the following terms: 25% thereof every thirty days until fully paid."

The trustee has urged throughout this proceeding that the paragraph of the contract just quoted was sufficient to classify it as one of sale rather than consignment on the theory that its provisions indicated the parties to the agreement contemplated a purchase by the dealer. The testimony of Mr. Irwin (Tr. p. 18) and the testimony of Mr. Rothschild (Tr. p. 35) discloses that at no time did the petitioners seek to exercise the option given them under this paragraph to require the consignee to pay for the goods which were left in its hands on the termination of the contract.

This argument was answered by the District Court's decision in the following language:

> "The agreement of the bankrupt to buy the merchandise at the option of the manufacturer at the termination of the contract does not create a sale, as the parties may make a valid consignment agreement making provision for change, and until the change is effected, the agreement is one of consignment. *Mitchell Wagon Co. vs. Poole,* 235 Fed. 817. * * * The contingency not having matured into a fixed status, the merchandise shipped on consignment and delivered to the trustee, should be accounted for by him." (Tr. pp. 236 and 237.)

This statement of the law is supported by the following decisions:

In re Eichengreen, 18 Fed. (2nd) 101;
Mitchell Wagon Co. vs. Poole, 235 Fed. 817;
In re Galt, 120 Fed. 64;
In re Harris & Bacherig, 214 Fed. 482;
Franklin vs. Stoughton Wagon Co., 168 Fed. 857;
McClallum vs. Bray-Robinson Clothing Co., 24 Fed. (2nd) 35;
Bransford vs. Regal Shoe Co., 237 Fed. 67;
In re Thomas, 231 Fed. 513.

In re Thomas, supra, it was stated:

> "Applying this rule to the case at bar, the question is, Whether the bankrupt assumed liability for the purchase price of the pianos at the time he received same. It is clear from reading the contract that the bankrupt did not assume this liability, but he was only to become liable for the pianos in the event the Piano Company at the end of six months exercised the option to require him to pay for same. This contingency never arose in this case, and therefore the pianos remained on consignment with the bankrupt at the time of his adjudication, and the trustee took them in the same plight."

The referee attempts to distinguish these cases in his memorandum decision (Tr. pp. 207 and 210 inclusive) on the ground that most of the cases there cited involved contracts giving the consignor the right to recall the goods at any time. However, as we have shown under the subheading immediately preceding this, that right also existed in the instant contract.

The referee further distinguishes the instant case by saying that here the option given in paragraph 10 is not dependent on any outside condition or contingency, such as the dealer's breach or failure to perform the contract or the expiration of a fixed period of time, but might have been exercised by the manufacturer at its will at any time by terminating the contract. (Tr. p. 210.) We have been unable to find any cases supporting this distinction. The rationale of the decisions above cited is that the parties did not, by such an optional provision, contemplate a sale until the exercise by the consignor of his option to require the consignee to purchase. Logically it can make no difference whether the option to purchase might be exercised on his own whim or might be exercised by the consignor for some act or default of the consignee. The fact remains in both instances that it never was the intention of the parties to effect a sale *until the option was exercise.*

In *Mitchell Wagon Co. vs. Poole, supra,* an agreement requiring the dealer to purchase at the manufacturer's option, (a) at the expiration of the selling period of twelve months, and (b) in case the dealer sold or closed out his business, was held valid. That contract further provided that the consignee might become a purchaser at any time during the twelve months period by paying cash for the consigned merchandise. The argument advanced by the referee would be just as applicable to

a contract giving the consignee the right to purchase without any affirmative act of the consignor as it is to paragraph 10 of the instant contract.

In re Galt, supra, it was said:

> "The company should not compel a return of the goods not sold. Galt had not the option to pay for them in money. Even with respect to the goods unsold within the 12 months, the option for their return or payment was with the company, and not with Galt; and nowhere in the agreement does the latter covenant to pay for these goods as in the case of a sale."

In *Bransford vs. Regal Shoe Company, supra,* the contract contained a provision identical with that of paragraph 10 of the instant contract, providing:

> "That upon the termination of this agreement it (consignee) will purchase of the party of the first part (consignor) all consigned goods then on hand at invoiced prices and terms."

The contract further provided that the contract might "also be terminated by party of the first part at any time by giving thirty days' notice in writing to that effect to party of the second part." So that in the Bransford case the consignor might, as here, by its act in terminating the agreement exercise the option to require the consignee to purchase, yet it was there held that the consignment contract was a valid one.

3. The District Court's Decision Is Supported by:

A. Decisions of This Court.

The District Court's decision is in harmony with the following decisions of this court:

General Electric Co. vs. Brower, 221 Fed. 597;
In re King, 262 Fed. 318;
Berry Bros. vs. Snowden, 209 Fed. 336,
Miller Lumber Co. vs. Citizens Trust and Savings Bank, 233 Fed. 488.
See also *In re Caldwell Machinery Co.,* 215 *Fed.* 428 (D. C. Wash.)

In *Berry Bros. vs. Snowden, supra,* this court, in reversing a decision of the District Court of Washington holding that the contract there involved was one of sale rather than consignment, said in part:

> "It will be seen from the foregoing statement that the proper disposition of the appeal depends upon the true character of the agreement between Berry Bros. and Graves & LaBelle. The court below held that it constituted as to the creditors, if not an absolute sale, a conditional one, and that it was void as against the creditors because not recorded pursuant to a statute of the state of Washington requiring recordation of such sales. But we are unable to so regard the contract between the parties. We think it was not a sale of any kind. In more than one place in the agreement it is distinctly stated that the goods were to be consigned for sale, which is an altogether different thing. The true distinction between a sale and an option to purchase, said the Supreme Court in *Sturm vs. Boker,* 150 U. S. 329, 14 Sup. Ct. 99, 37 L. Ed. 1093, is pointed out by the Supreme Court of Massachusetts in *Hunt vs. Wyman,* 100 Mass. 198, 200, as follows:

'An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return.'

Such cases are strictly analogous to that now before us. If, as the court below in effect held, the title to the goods under the contract passed from Berry Bros. to Graves & LaBelle, how comes it that the former were thereby required to pay the freight, cartage, storage and insurance on the goods while in Graves & LaBelle's warehouse? Such provisions in respect to payments by Berry Bros. are wholly inconsistent with the passing of the title to the property from them to Graves & LaBelle. So, also, is that other provision of the contract by which the latter agreed 'to pay for such goods sold by them or taken from consigned goods while in their possession on the terms which they are billed by the party of the first part on their regular invoice.'

The invoices, or 'detailed statements' as they are called in the stipulation of the parties, did not change the terms of the written agreement under which the property was sent to the consignees. 'An invoice,' as said by the Supreme Court in *Dows vs. National Exchange Bank,* 91 U. S. 618, 630 (23 L. Ed. 214), 'is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale. * * * Hence, standing alone, it is never regarded as evidence of title.' See also, *Sturm vs. Boker,* 150 U. S. 312, 328, 14 Sup. Ct. 99, 37 L. Ed. 1093.

And that neither of the parties to this contract considered that it was in truth anything more than it purported to be, to-wit, a mere consignment of the goods for sale upon the terms and conditions therein stated, is very clearly shown by the agreed statement of facts, from which it appears, among other things, that Berry Bros. at various times 'withdrew parts of the goods so consigned by them and stored them as aforesaid and sold the same on their own account, independent of, but with the knowledge of and without objection by, the the said Graves & LaBelle'; and that, whenever Graves & LaBelle withdrew any portion of the said consigned goods from their warehouse, report of such withdrawal was made by them to Berry Bros., and 'monthly statements were rendered by said Berry Bros. to said Graves & LaBelle of the amount of such stock so withdrawn during the preceding month.' It is manifest that such conduct of the parties is wholly inconsistent with the idea of a sale on the part of the one and a purchase by the other.

We think the contract clearly one of bailment, and that the bankrupts never acquired title to any of the consigned property that they did not purchase pursuant to the option given them by the contract. See *Sturm vs. Boker,* 150 U. S. 328, 329, 14 Sup. Ct. 99, 37 L. Ed. 1093. While it is true that under the amendment of the Bankruptcy Act of June 25, 1910, a trustee in bankruptcy is vested with the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, the lien so given is a lien on the property of the bankrupts and not a lien on the property of third persons.

The conclusion to which we have come is, we think, supported by the cases of *Wood Mow-*

ing & Reaping Mach. Co. vs. Vanstory, 171 Fed. 376, 96 C. C. A. 331; *Southern Hardware & Supply Co. vs. Clark,* 201 Fed. 1, 119 C. C. A. 339; *L. S. Smith & Bros. Typewriter Co. vs. Alleman,* 199 Fed. 1, 117 C. C. A. 577; *In re Columbus Buggy Co.,* 143 Fed. 859, 74 C. C. A. 611; *In re Reynolds* (D. C.), 203 Fed. 162."

B. Decisions of the State Supreme Court.

The District Court's decision is also in harmony with the decisions of the Supreme Court of the State of Washington.

Eilers Music House vs. Fairbanks, 80 Wash. 379, 141 Pac. 885;
Inland Finance Co. vs. Inland Motor Car Co., 125 Wash. 301, 216 Pac. 14.
Jordan vs. Peek, 103 Wash. 94, 173 Pac. 726;
Ransom vs. Wickstrom & Co., 84 Wash. 419, 146 Pac. 1041.

In *Inland Finance Co. vs. Inland Motor Car Co., supra,* it was said:

> "It is our opinion that the trial court was in error in holding the agreement between the appellant and the motor car company to be a contract of conditional sale. A conditional sale, as the very terms imply, is a sale in which the transfer of the title to the buyer, or his retention of the title, is made dependent upon some condition. Usually the condition imposed is the payment of the purchase price, but, whatever may be its nature, to constitute a conditional sale there must be a contract between the parties by which the one party agrees to sell and the other party agrees to buy. This is not only the general understanding of such a transaction, but it is the transaction the statute regulates. The wording of the statute is (see Rem. Comp. Stat. Sec. 3790) P. D. Sec. 9767):

'That all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute * * * unless * * * a memorandum of such sale, stating its terms and conditions * * * shall be filed * * *.'

These words plainly imply an agreement to sell on the one part and to buy on the other, and just as plainly imply that without such an agreement there is no conditional sale.

Turning to the record, it is at once apparent that there was no contract on the part of the appellant to sell, nor any contract on the part of the respondent to buy, the automobile here in question. The contract between them was a contract of consignment, under which the motor car company had the right to sell the automobile for and on behalf of the appellant. But it carried no right in the consignee to mortgage, pledge, barter or exchange the property for its own purposes, nor to sell it for a prior debt of its own, and hence the consignee's attempt to mortgage it was invalid. *Eilers Music House vs. Fairbanks,* 80 Wash. 379, 141 Pac. 885."

4. Conduct of Parties Subsequent to Consignment Agreement Was Not Such as to Show Sale.

A. Mingling of Consignee's Goods With Dealer's Goods.

It has been contended by the trustee that the conduct of the parties subsequent to the execution of the consignment agreement was such as to indicate that they did not intend to enter into a *bona fide* consignment arrangement. The fact that the

consigned goods were mingled with the other goods of the bankrupt upon its floors has been pointed out as affecting the validity of the consignment agreement.

In re National Home & Hotel Supply Company, 226 Fed. 840, 847, the fact that the petitioner's goods were commingled with other goods in the bankrupt's store without identification as consigned goods was held not to affect the agreement.

In the instant case the testimony of Messrs. Rothschild and Wadenstein is undisputed to the effect that the consigned goods could be displayed to the best advantage by mingling them with goods owned by the bankrupt.

B. Failure by Consignee to Comply With Contract in All Respects.

The fact that the dealer did not promptly report sales of consigned merchandise to the petitioner as required by the contract is strongly stressed in the referee's opinion as an important factor in determining against the validity of the consignment agreement.

Concerning such an argument, it was said *In re Weisl,* 300 Fed. 635, 640:

> "*Taylor vs. Fram* (C. C. A. 2), 252 Fed. 467, 164 C. C. A. 389, was also quite a different case. The Circuit Court of Appeals did not hold that the agreement was fraudulent *per se,* but that the parties made no effort to live up to it, and that for that reason it was no more than

the cover for an effort in effect to sell the goods and keep a secret lien upon them in the seller's favor. The agreement at bar was lived up to in all respects, except that in 1923 Dudley had filed no accounts of its sales until bankruptcy. That was, indeed, slack, very slack, business; but, while this was probably due to Breaker's control of both parties, it was in no sense because the arrangements were not *bona fide.* It would have been absurd for Seacoast intentionally to accept as a buyer a firm which was showing itself doubtful as a factor. When such a one begins to exhibit symptoms of financial decrepitude, the principal would be the last of all to step into the position of creditor. There was nothing whatever to be inferred from the delays in submitting the accounts and in remitting for the sales made, except that Breaker was abusing his position as president of Seacoast by allowing Dudley to remain in default."

To the same effect are:

M'Elwain-Barton Shoe Co. vs. Bassett, 231 Fed. 889;

In re National Home & Hotel Supply Co., 226 Fed. 840.

C. Form of Statement to Consignee.

The trustee has contended that the fact that the invoices covering the consigned merchandise did not on their face state that the merchandise was consigned is another indication that the parties did not intend a valid consignment. It will be remembered that the invoices of both petitioners to the dealer were marked "terms special" and that both Messrs. Irwin and Rothschild testified that that was the term coined to denote the special consignment arrangement.

Concerning such a contention, it was said in *M'Elwain-Barton Shoe Company vs. Bassett, supra:*

> "The billing of the shoes by appellant on the ordinary blank forms, without reference to the contract, cannot be allowed to overcome the contract itself, and the other undisputed testimony that the shoes were shipped under the terms of the contract."

To the same effect is *In re Reeves,* 227 Fed. 711, (D. C. N. Y.).

D. Mingling of Proceeds of Sale.

The mingling of the proceeds of the sale of the consigned goods with general funds of the bankrupt does not affect the validity of the consignment agreement.

In re National Home & Hotel Supply Company, 226 Fed. 870, it was said:

> "While the proceeds of these sales were mixed with the bankrupt's funds, slips were kept of all goods sold for the purpose of making the accounting, and as a matter of bookkeeping the funds were not mixed."
> The same may be said of the instant case.

To the same effect is *Healey vs. Boston Batavia Rubber Company,* 268 Fed. 75.

5. Effect of Dealer's Financial Condition on Validity of Contract.

Great stress was laid by the trustee in the hearing before the referee and in the proceedings subsequent thereto, upon what the trustee contended

was the insecure financial condition of the dealer at the time of the execution of the consignment agreements as indicative of an intention on the part of the petitioners to enter into an arrangement with the dealer whereby they would claim the merchandise should the dealer fail and claim a sale in the event of its success. The contract, of course, does not bear out any such intention on the part of the parties.

It will be remembered that both Messrs. Irwin and Rothschild testified that they relied upon the bankrupt's financial condition as disclosed by its report dated January 1st, 1928, showing assets substantially in excess of liabilities. Regardless, however, of the dealer's financial condition at that time, it has been held in a number of cases that knowledge on the part of the consignor that the consignee was financially unable to purchase merchandise on open account does not affect the validity of the consignment.

We cite in support of this proposition:

Bartling Tire Co. vs. Coxe, 288 Fed. 314 (5th C. C. A.);

Thomas vs. Field-Brundage Co., 215 Fed. 891 (8th C. C. A.);

In re National Home & Hotel Supply Co., 226 Fed. 840, (D. C. Mich.).

ARGUMENT UPON CROSS-APPEALS.

I.

The Bills of Sale.

1. The Ketcham & Rothschild Bills of Sale.

A. The District Court's Decision Overlooks Letter of March 23rd Attached to Contract, Which Discloses Sale Was Not Effected Until Execution of Bill of Sale.

It will be remembered that on March 23rd, 1928, the date of Mr. Rothschild's negotiations in Seattle with the bankrupt, the latter owed his concern some $16,000.00, the indebtedness arising from furniture previously sold the bankrupt on open account. (Tr. p. 18.) It was agreed between Rothschild and Wadenstein that the furniture previously sold the latter by Ketcham & Rothschild and then on the bankrupt's floors should be transferred back to Ketcham & Rothschild by means of a bill of sale and, after that happening, held by the bankrupt under the consignment agreement. This plan was evidenced by the following recitation contained in paragraph 9 of the consignment agreement:

> "Said party of the second part now has in its possession certain goods, as per attached list, which have heretofore been sold and delivered to it by said party of the first part on credit and which have not been paid for, and it is hereby agreed that the title to said goods and the same *is hereby transferred* and conveyed back to said party of the first part and that from and after this date the same shall be treated as having been delivered to said party of the second part on consignment and under

and subject to all of the terms and conditions of this contract. In consideration of the transfer and conveyance of the title to said goods back to said party of the first part, that company does hereby cancel the indebtedness of said party of the second part for said goods."

Before the consignment agreement was executed by the bankrupt, it was discovered that the provisions of paragraph 9 just quoted could not be carried out for the reason that the bankrupt was unable to furnish an "attached list" of the merchandise which was to be transferred back. Mr. Rothschild testified:

> "At the time the consignment agreement was signed by the dealer we did not know exactly what furniture was on their floor; we knew there was an approximate quantity in dollars and cents. No list of our furniture on their floor specifying as to items was given to me while I was here in March but the approximate figure was taken from their stock cards and rendered. Subsequently they gave us a bill of sale back for the furniture of ours which was on their floor." (Tr. pp. 20 and 21.)

This testimony was borne out by Mr. Wadenstein, who said:

> "At the time the consignment contract was entered into Mr. Rothschild did not have an exact list of the furniture to be conveyed back in accordance with paragraph 9 of the consignment agreement. We went over our stock record to arrive at the approximate amount. It would have been necessary for us to take an inventory *to furnish him at that time with an exact itemized list of the Ketcham & Rothschild furniture on our floor and we did not have*

> *time to do that while he was here.* At the time Mr. Rothschild was here it was not known either to Mr. Rothschild or to us what was the specific goods which would be conveyed back to the Irwin Company in accordance with the agreement." (Tr. pp. 38 and 39.)

In order to harmonize the statement in paragraph 9 of the consignment agreement that a list of the goods to be transferred back was "attached" therto and that a transfer back thereof in *praesenti* was intended with the fact that an itemized list of the furniture could not be furnished at that time, the bankrupt, contemporaneously with the execution of the consignment agreement, signed the letter of March 23rd, 1928, reading as follows:

> "Referring to the *attached* memorandum of agreement:
>
> It is our understanding that we are to furnish, shortly after the first of the month, an inventory of all of your merchandise on hand; that we also are to furnish bill of sale *which will act* as a transfer back to your Company of this merchandise, and that any difference in the amount of the account will be taken care of in three (3) equal payments, thirty, sixty and ninety days.
>
> This refers particultrly to paragraph number nine." (K&R's Exhibit 1.)

Remington's Compiled Statutes, Sec. 5827, provides:

> "No bill of sale for the transfer of personal property shall be valid, as against existing creditors or innocent purchasers, where the property is left in the possession of the vendor

unless the said bill of sale be recorded in the auditor's office of the county in which the property is situated, within ten days after such sale shall be made."

The District Court in its decision held that inasmuch as paragraph 9 of the contract contemplated a present sale by employing the words "is hereby transferred and conveyed back to said party of the first part," the Ketcham & Rothschild bill of sale was not recorded "within ten days after such sale" within the meaning of Remington's Compiled Statutes, Sec. 5827, *supra*. The District Court said:

> "The sale or transfer was made on the 23rd of March and delivered to and executed by the petitioners March 30th and April 1st, respectively. The bill of sale made on August 6, 1928, to Irwin & Company is but evidence of the sale made on the 23rd day of March, and the bill of sale not having been filed for record, cannot in any event have validity as against creditors, and, by the same token, the bill of sale executed by the bankrupts on the 16th day of April, 1928, and filed for record April 24 following is evidence only of the transfer made in March, *supra,* and the filing on the 24th of April is ineffective. The fact that an inventory was furnished at a later date is immaterial, since the contract was complete as to the essentials, and the formalities after inventory are immaterial." (Tr. p. 234.)

It is conceded that if April 16th, the date of the execution of the Ketcham & Rothschild bill of sale, be taken as the true date of that sale, then the bill of sale having been recorded on April 24th was timely recorded. It will be noted that the District

Court in its reasoning entirely overlooks and fails to mention the letter of March 23rd, which the referee in his memorandum decision (Tr. p. 194), found was executed contemporaneously with the consignment agreement, which fact was also specifically found by the referee in his finding 43. (Tr. p. 98.) This finding is not disputed by any testimony in the record and is supported by the testimony of Mr. Rothschild (Tr. p. 20) and of Mr. Wadenstein (Tr. p. 39). It is also supported by the context of the letter itself, which refers to the consignment contract as "being attached."

The conclusion is, therefore, inescapable that the District Court erred in failing to find and hold that the parties to the consignment agreement and the attached memorandum of March 23rd intended not a present sale but a sale when the items of furniture to be transferred back had been ascertained and the bill of sale executed, which took place on April 16th, 1928. The recording of that bill of sale on April 24th was, therefore, within the ten day period and timely.

This conclusion, which we submit is inescapable, was assented to by the referee in his memorandum decision (Tr. p. 221), where he said:

> *"The letter of March 23d was a part of the contract. It provided for the subsequent execution of a bill of sale. Such a bill of sale was executed on April 16th, and delivered to Ketcham & Rothschild. It was filed in the office of the Auditor of King County, Washington, on*

April 24th, which was within the statutory ten day period. This bill of sale, however, is here invalid because of the vendor's insolvency.

The last sentence of this quotation brings us to the next step in our discussion.

B. The Bill of Sale Was Not a Preference Because the Dealer Was Not Insolvent and the Consideration Was [redacted] a Present One.

The referee, in holding that the bills of sale constituted unlawful preferences, applied the state court rule as announced in *Nixon vs. Hendy Machine Works,* 51 Wash. 419, 99 Pac. 11, that when a corporation is not able to pay its debts in due course of business it is insolvent as far as its creditors are concerned and cannot prefer one over the other. (Tr. p. 218.)

The District Court said in this regard (Tr. p. 232):

> "The state insolvency laws are not controlling, in view of sub. (15), section 1, Bankruptcy Act:
>
> 'A person shall be deemed insolvent under the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts.'
>
> No actual fraud is shown within the state insolvency laws."

The following decisions support the District Court's holding that in bankruptcy proceedings the federal and not the state rule of insolvency is applicable:

U. S. vs. State of Oklahoma, 261 U. S. 253, 67 L. Ed. 638;
McGill vs. Commercial Credit Co., 243 Fed. 637;
In re Chappell, 113 Fed. 543;
In re Walker, 235 Fed. 285.

Were the assets of the bankrupt sufficient at the time of the execution of the bill of sale on April 16th to pay its debts? The trustee can point out no testimony in the record warranting a negative answer to this question. Petitioner Irwin's Exhibit 18-A was a financial statement of the bankrupt dated January 1st, 1928, prepared by its bookkeeper and a correct reflection of its financial condition at that time. (Tr. p. 62.)

Mr. Wadenstein said:

> "That was prepared by our bookkeeper at my request from the books of our concern, turned back to me by the bookkeeper before it was sent to Robert W. Irwin and was examined by me when I enclosed it in that letter. * * * This represents the condition of our business at that time as far as I know." (Tr. pp. 62 and 63.)

That statement shows assets of $230,580.52, with liabilities of $129,839.42, leaving an equity in capital and surplus of $100,741.10. (Tr. p. 12.)

Mr. Wadenstein testified that the value of his corporation as of April 1st, 1928, was more than $100,000.00. (Tr. p. 63.)

Petitioner Ketcham & Rothschild's Exhibit for Identification 54, consisting of balance sheets made up by Racine & Company from the bankrupt's bookkeeper's trial balances, show the net value of bankrupt to have been more than $100,000.00. (Tr. p. 63.)

Mr. Wadenstein testified:

> "On April, 1928, we thought we had a business having an equity of $100,000. The period of five months up to September 1 so revolutionized our ideas that we meditated an assignment. The figures had jumped to a point that we felt it was not safe to continue any longer without some revision of our plans without jeopardizing the interests of our creditors." (Tr. p. 47.)

The reason for the failure was over-expansion caused by the move into the new building. Mr. Wadenstein said:

> "There was no question at all that we were operating with too little capital, but it is my firm belief that if we had not moved into the new building we would not have failed." (Tr. p. 46.)

We take it that the burden was on the trustee to establish that the bankrupt was insolvent and that the bill of sale was a preference. The trustee has done nothing further than to show that the dealer was a little slow in paying its bills. There can be no question, however, that had the dealer's

business been liquidated on April 16th, 1928, each creditor would have received one hundred cents on the dollar.

But regardless of the solvency or insolvency of the dealer on the date of the execution of the bill of sale, it was executed for a valid present consideration and hence was not a preference.

> "The rule denying the right to prefer particular creditors does not prevent a corporation, although insolvent, from making transfers or mortgages of its property in good faith to secure present advances of money to be used in paying its debts, in extricating itself from its difficulties, or otherwise in continuing the business, and it has been said that questions arising upon attempt by an insolvent corporation to prefer one creditor over another have no relation to transactions of this character."
> 14-A *C. J.* 899.

See also:

Terhume vs. Weise, 132 Wash. 208, 231 Pac. 954;
Lloyd vs. Sichler, 94 Wash. 611, 162 Pac. 45;
Hoppe vs. First National Bank of Renton, 137 Wash. 41, 241 Pac. 662;
Smith vs. National Bank of Commerce of Seattle, 142 Wash. 428, 253 Pac. 644;
Brinker vs. Peoples Savings Bank, 144 Wash. 93, 256 Pac. 1025;
Fogg vs. Blair, 133 U. S. 534.

In the latter case it was said:

> "That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders.

> It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred or mortgaged to *bona fide* purchasers for a valuable consideration except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

What was the valid present consideration in this case? The consideration was partially expressed in paragraph 9 of the consignment agreement after the cancellation of "the indebtedness of said party of the second part for said goods," but it went further than that. The dealer had committed itself to move to new quarters at Fifth and Pike Streets. These new quarters and its contemplated mode of business required considerable expansion in the display of furniture it would carry on its floors. It was a firm dealing only in high grades of furniture and having that reputation with the public and unique in its class. The testimony shows that the two petitioners were also in a class by themselves as manufacturers of high grade furniture. Obviously it became necessary for the bankrupt, upon removal to its new location, to make arrangements to carry an amount of extensive and high grade furniture commensurate with its expanded quarters.

After consultation by the dealer with the petitioners, it was found that the petitioners did not desire to sell the dealer the $25,000.00 or $30,000.00 worth of furniture such a display would have entailed and which, as we have said, was a necessary

and component part of the bankrupt's carrying on the new business in the new location. The petitioners were, however, willing to place with the bankrupt on consignment $15,000.00 worth of goods in the case of Robert W. Irwin Company, and $4,000.00 worth in the case of Ketcham & Rothschild, Inc., provided the bankrupt would, as a consideration for the petitioners' assistance in the new venture, sell back to the petitioners the merchandise of the petitioners at that time on the bankrupt's floor, the petitioners consenting that the merchandise so transferred back would remain with the bankrupt on consignment.

If it be objected that the petitioners did not obligate themselves in any way to consign merchandise to the dealer in the future, the answer is that they actually did execute their promise in that regard. We have, therefore, not a case of creditors of an insolvent concern preferring themselves over the remainder of the creditors by taking back goods previously sold to secure the pre-existing indebtedness, but we do have an exactly contrary case, viz., the bankrupt giving to the petitioners a transfer of goods previously sold in consideration for the shipment of some $20,000.00 worth of merchandise on consignment, which was of material and necessary assistance in the new venture, and a cancellation by the petitioners of the indebtedness created by the sale of the merchandise which was transferred back.

There is no dispute but that there came into the hands of the trustee in bankruptcy furniture included in the Ketcham & Rothschild bill of sale in the amount of $5,731.75. (Tr. p. 95.) The District Court's order should have directed the trustee to pay the petitioners, Ketcham & Rothschild, the 70% of that sum to which it was entitled under the stipulation for the sale of the consigned furniture by the trustee set forth on pages 183 *et seq.* of the transcript.

2. The Irwin Bill of Sale.

A. The Property Was Not Left in the Possession of the Vendor Within the Meaning of Rem. Comp. Stat. Sec. 5827, Requiring the Recording of Bills of Sale.

It will be remembered that while the Irwin consignment agreement was executed by the bankrupt on March 23rd and by the Irwin Company on April 1st (Tr. p. 112), and while the parties were operating under that agreement subsequent to the date of the execution, although it was not returned by the petitioner to the bankrupt until a later date, the Irwin bill of sale was not executed until August 6th, 1928. This delay was occasioned, as testified to by Mr. Wadenstein, because the parties were unable to agree upon how much of the Irwin make of furniture was to be included in the bill of sale to that company. (Tr. p. 40.) The letters and the exhibits which we have referred to in the statement herein show that constantly and continuously between April 1st and August 6th correspondence was

passing between the dealer and the petitioner, having as its object the reaching of an agreement as to the amount of merchandise and the items which were to be included in the bill of sale.

The bill of sale was not recorded and it was the District Court's conclusion (Tr. p. 234) that this failure made the Irwin bill of sale vulnerable to the trustee's attack. This conclusion overlooks the fact that Remington's Compiled Statutes, Sec. 5827, *supra,* only requires the recording of the bill of sale "where the property is left in the possession of the vendor." In this instance the vendor was Renfro-Wadenstein, a corporation, in its capacity as owner of the merchandise of this petitioner previously shipped on open account. After April 1st, 1928, the parties were operating under the consignment agreement. The property included in the Irwin bill of sale was not left in the possession of the vendor within the meaning of the above statute, but was left with it as consignee or bailee for the petitioner. Where previously the dealer had held the property as its own merchandise, subsequent to that date it was held by the dealer as consignee for the petitioner. Everything was done which, under the circumstances, could have been done to have denoted a transfer of possession from the bankrupt corporation to Renfro-Wadenstein as consignee for petitioner. Notes were executed by the bankrupt to petitioner as evidence of the indebtedness for the difference between the total debt and the merchan-

dise transferred back. The merchandise so transferred back, where it had been previously shown on bankrupt's books as its own merchandise, was transferred to a separate consignment folder. The bankrupt's books showed a cancellation of the indebtedness incurred in the purchase of this furniture. To have actually re-transferred this property to the petitioner would have necessitated the useless gesture of sending it back to Grand Rapids and then returning it to the bankrupt.

That the possession of the property is not necessarily left with the vendor within the meaning of this section because there is no manual delivery of the property sold, was announced in the following cases:

> *Haskins vs. Fidelity Nat. Bank,* 93 Wash. 63;
> *Spiecker vs. First Nat. Bank of Odessa,* 134 Wash. 280.

In the *Haskins case, supra,* it was said:

> "Although such possession as a purchaser can reasonably take must be taken, it is not essential, as against creditors and subsequent purchasers, that there should be in all cases an actual manual delivery or a change of possession at the time of the sale, or immediately."

The District Court's decision as to the Irwin bill of sale is based solely upon the ground that it was not recorded within the statutory period. (Tr. p. 234.) We respectfully submit that for the reasons above stated it was unnecessary to record this bill of sale.

Furthermore, the same considerations exist for holding the Irwin bill of sale was not an attempt to prefer it over the remainder of the creditors of the dealer as exist in the facts surrounding the execution of the Ketcham & Rothschild bill of sale. As we have attempted to show, the dealer's assets were at the time of the execution of the consignment agreement more than sufficient to liquidate its then existing debts and an ample present consideration flowed from the petitioner to the dealer for the execution of the bill of sale back.

In conclusion on this point, the referee found, and it is uncontradicted, that there came into the hands of the trustee furniture described in the Irwin bill of sale to the amount of $8,391.00. (Tr. p. 93.) We submit that petitioner should not have been relegated to relief as a general claimant on this item.

II.

Accounts Receivable and Proceeds of Sale of Consigned Furniture.

1. These Items Have Been Definitely Traced to the Trustee.

The referee found, and it is undisputed, that there came into the hands of the *trustee in bankruptcy:*

> (a) Contracts and accounts receivable representing Irwin merchandise (including goods described both in the bill of sale and shipped

subsequent to the consignment agreement), which contracts and accounts receivable were not collected prior to the bankruptcy proceeding, amounting to $1,725.00. (Tr. pp. 93 and 94.)

(b) Contracts and accounts receivable representing Ketcham & Rothschild merchandise (including merchandise described in bill of sale and shipped subsequent to consignment agreement), which contracts and accounts receivable were not collected prior to the bankruptcy proceeding, amounting to $2,021.00.

It is further conceded that an examination of the exhibits in this case (petitioners' Exhibits 50 to 52 inclusive) disclose what proportion of these two items were composed of receivables representing furniture covered by the bill of sale and what proportion of furniture shipped subsequent to the consignment agreement. Obviously the District Court, to have been consistent in its holding that the consignment agreements were valid as to the merchandise shipped subsequent thereto, should have also awarded petitioners so much of these *uncollected* contracts and accounts receivable coming into the hands of the trustee as arose from the sale of furniture shipped subsequent to the consignment agreements. The District Court, however, dismissed the matter with the statement (Tr. p. 238):

> "No trust relation has been traced to accounts which came into the possession of the trustee in bankruptcy, or merchandise sold under consignment. These funds were so commingled with the general funds of the bankrupt that no identity is established."

This holding, of course, is contrary to the undisputed findings of the referee above noted.

It further overlooks the fact that the entire assets of the bankrupt were sold at trustee's sale under order of court and stipulation between the trustee and petitioners (Tr. p. 186 *et seq.*), the order showing that the very property sought to be reclaimed came into the hands of the trustee, reciting the property to be sold to be in part:

> "All notes, bills, accounts and contracts receivable, including those made by S. T. Hills as trustee and including any collections made by S. T. Hills as trustee on accounts assigned to General Discount & Mortgage Corporation and/or Seattle Discount Corporation, * * *." (Tr. p 189.)

The record also shows that S. T. Hills as assignee for Renfro-Wadenstein:

(a) Received payment on Irwin furniture (including furniture described in the bill of sale and shipped subsequent to the consignment agreement) sold by bankrupt prior to the assignment for the benefit of creditors in the sum of $425.67.

(b) Sold Irwin furniture (including furniture described in the bill of sale and furniture shipped

subsequent to the consignment agreement) for which there was collected by him and the receiver and the trustee in bankruptcy $2,062.00. (Tr. p. 94.)

The record discloses that as represents the Ketcham & Rothschild furniture, Hills as assignee:

(a) Received payments on furniture (including furniture described in the bill of sale and shipped subsequent to the consignment agreement) sold by bankrupt prior to the assignment for the benefit of creditors in the sum of $568.75;

(b) Sold Ketcham & Rothschild furniture which was included in the bill of sale to Ketcham & Rothschild, for which there was collected by him and the receiver and the trustee $1,593.50. (Tr. p. 96.)

Hills as assignee turned over to McLean, who succeeded him as receiver in bankruptcy, $2,935.88 (Tr. p. 96), and McLean turned over to the trustee a fund in excess of $5,321.22. (Tr. p. 75.)

It will be seen, therefore, that the uncollected and unpaid accounts receivable and contracts were definitely and directly traced to the trustee. There can be no question about their identity. The collections made on the other accounts receivable and contracts were sufficiently traced into the hands of the trustee by the showing above made that the collections were made by the assignee and by the receiver and that a sufficient sum was turned over

to the trustee by the assignee and the receiver to cover those collections.

In the following cases it was held that the consignors were entitled to recover from the trustee in bankruptcy accounts receivable representing consigned merchandise and the proceeds thereof under circumstances similar to those existing here.

International Agriculture Corp. vs. Sparks, 250 Fed. 318 (D. C. S. C.);
Bartling Tire Co. vs. Coxe. 288 Fed. 314;
In re McGehee, 166 Fed. 928;
In re Taft, 133 Fed. 511;
In re Bank of Madison, Fed. Cas. No. 890;
In re Kurtz, 125 Fed. 992.

2. The Assignments of These Accounts to the Discount Houses Were Invalid.

The fact that some of the accounts receivable, with which we are here concerned, were assigned by the bankrupt to discount houses cannot affect petitioners' right to reclaim them. Paragraph 10 of the contract specifically provided that:

> "The accounts representing the same (consigned merchandise) and the proceeds thereof shall continue to belong to and be the property of the party of the first part. * * *"

The testimony of Messrs. Irwin and Rothschild discloses that they at no time had knowledge of or consented to the bankrupt's practice of discounting these accounts. In *Eiler's Music House vs. Fairbanks,* 80 Wash. 379, it was said:

> "It is the settled law that a factor can neither pledge the goods of his principal, nor

dispose of them by way of exchange or barter, nor sell them for a prior debt.

'Whenever the factor has bartered or disposed of goods in a manner not within the ordinary and accustomed modes of transacting the like business, the principal may follow and reclaim the property, and in such case it is wholly immaterial whether the person dealing with the factor knew him to be such or not. (Citing cases.)

In the absence of statutes which furnish protection to persons dealing with factors, the principal can recover his property wherever he can trace it as distinct from that of the factor into whomsoever's hands it may have come. He is entitled to recover the specific goods themselves if they can be had, and if the goods themselves cannot be recovered he may recover their proceeds if they can be traced. Thus if a factor barters his principal's goods in a manner not authorized by the principal and not within the ordinary modes of transacting business, the principal may follow and reclaim the property whether the person dealing with the factor knew him to be such or not. But if the principal has by any act of his own induced a third person to believe he has given the factor authority to dispose of the goods, the principal cannot reclaim them. The principal may recover goods or the proceeds of a consignment of a person to whom they were turned over in the payment of an antecedent debt due from the factor. If goods are wrongfully taken from the possession of a factor by an officer the owner may recover them back.' "

The testimony discloses that none of the finance houses ever made any collections on the customers' accounts assigned them, the collections were made

by the bankrupt; the finance houses did not bill the customers for the accounts receivable and did not at any time notify the customers of the assignment of the accounts to them, nor were the customers advised by the dealer that their accounts had been assigned. (Tr. p. 58.) One of the managers of the finance houses involved on the stand admitted as much. (Tr. p. 81.) The assignments to these finance houses under the circumstances were, under the following authorities, invalid:

Benedict vs. Ratner, 268 U. S. 353, 69 L. E. 991;
Fainardi vs. Dunn, 128 Atl. 207 (R. I.);
Jackson vs. Sedgwick, 189 Fed. 508.

It is therefore respectfully submitted:

1. As to the appeal of the trustee, the District Court's decision should be affirmed.

2. As to the cross-appeals of the petitioners, the District Court's decision should be reversed.

Respectfully submitted,

POE, FALKNOR, FALKNOR & EMORY,

C. K. Poe,
A. J. Falknor,
Judson F. Falknor,
DeWolfe Emory,
Solicitors for Appellees and Cross Appellants.

No. 6535

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

RENFRO-WADENSTEIN, a corporation, and RENFRO-WADENSTEIN FURNITURE COMPANY, a corporation, KETCHAM & ROTHSCHILD, INC., a corporation,
Cross Appellant,

—VS.—

WALTER S. OSBORN, as Trustee in Bankruptcy for Renfro-Wadenstein, a corporation, and Renfro-Wadenstein Furniture Company, a corporation, Bankrupts,
Cross Appellee,

and

ROBERT W. IRWIN COMPANY,
Cross Appellant,

—VS.—

WALTER S. OSBORN, as Trustee in Bankruptcy for Renfro-Wadenstein, a corporation, and Renfro-Wadenstein Furniture Company, a corporation, Bankrupts,
Cross Appellee.

UPON CROSS APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF TRUSTEE ON CROSS APPEAL

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No. 6535

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

RENFRO-WADENSTEIN, a corporation, and RENFRO-WADENSTEIN FURNITURE COMPANY, a corporation, Bankrupts.

KETCHAM & ROTHSCHILD, INC., a corporation, *Cross Appellant*,

—VS.—

WALTER S. OSBORN, as Trustee in Bankruptcy for Renfro-Wadenstein, a corporation, and Renfro-Wadenstein Furniture Company, a corporation, Bankrupts, *Cross Appellee*,

and

ROBERT W. IRWIN COMPANY *Cross Appellant*,

—VS.—

WALTER S. OSBORN, as Trustee in Bankruptcy for Renfro-Wadenstein, a corporation, and Renfro-Wadenstein Furniture Company, a corporation, Bankrupts, *Cross Appellee*.

UPON CROSS APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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STATEMENT OF THE CASE

The trustee subscribes to the statement contained in cross-appellants' brief to Page 14 thereof inclusive, except the conclusion drawn on Page 7 as to the date of execution of the contract and except the reference on Pages 10 and 11 to a *modification* of the contract by a letter under date of March 23. Beginning with Page 15, the statement partakes of the nature of argument and accordingly, we take exception to the remainder thereof. There is no disagreement as to the amounts of merchandise or accounts receivable or proceeds involved in the action since the sums enumerated in cross appellants' brief correspond with the findings of the referee (Tr. 93-96 incl.). These figures were likewise employed by the District Court in its decision (Tr. 230-231). In this regard, we except only to the inference on Page 73 of cross-appellants' brief to the effect that there was turned over to the trustee a fund in excess of $5,321.22, resulting from sales of consigned merchandise. While the receiver turned over such sum to the trustee, that sum comprised the amount that Hills as assignee turned over to the receiver, together with additional collections made by Hills up to the time of the election of the trustee.

> "None of these additional collections involved furniture here in dispute." (Tr. 75)

BRIEF OF ARGUMENT

I

As against the trustee, there was no valid transfer from Renfro-Wadenstein to Ketcham & Rothschild of merchandise shipped prior to April 1, 1928.

(a) Bill of sale was not recorded within ten days after sale, and is therefore invalid.

1. Sale was consummated March 23, 1928.

2. The letter of March 23 does not affect the contract.

3. Contract was accepted by Ketcham & Rothschild more than ten days prior to recordation of bill of sale.

(b) The merchandise was left in the possession of dealer.

II

As against the trustee, there was no valid transfer from Renfro-Wadenstein to Irwin & Company.

(a) Irwin's bill of sale was never recorded.

(b) The merchandise was left in the possession of dealer.

III

The transfers would in any event be a preference.

(a) Trustee is in position of creditor and is entitled to benefits of state law.

(b) Dealer was insolvent at the time of the transfer.

(c) Insolvent corporation may not prefer its creditors.

(d) No present consideration was given dealer.

IV

Accounts and proceeds may not be reclaimed.

(a) They do not constitute a trust fund.

(b) The fund was not traced.

ARGUMENT

At the outset, the cross appeals herein are immaterial if the court finds that the contracts were not valid consignments, for cross appellants' right of reclamation is predicated solely upon the consignment agreements. Consequently, a discussion on the cross appeals is pertinent only if the court should find that the so-called consignment contracts are in fact consignments.

I

There was no valid transfer from dealer to Ketcham & Rothschild of merchandise shipped prior to April 1, 1928.

Section 5827, Remington's Compiled Statutes is as follows:

> "No bill of sale for the transfer of personal property shall be valid, as against *existing*

creditors or innocent purchasers, where the property is left in the possession of the vendor, unless the bill of sale be recorded in the auditor's office of the county in which the property is situated, within ten days *after such sale is made.*" (Italics supplied)

The so-called consignment agreement, paragraph 9 thereof, provided:

"Said party of the second part has in its possession certain goods, as per attached list, which have heretofore been sold and delivered to him by said party of the first part on credit, and which have not been paid for, *and it is hereby agreed that the title to said goods, and the same is hereby transferred and conveyed back to said party of the first part, and that from and after this date same shall be treated as having been delivered to said party of the second part on consignment and under and subject to all of the terms and conditions of this contract.* In consideration of the transfer and conveyance of the title to said goods back to said party of the first part, that company does hereby cancel the indebtedness of said party of the second part for said goods." (Tr. 115, 116, Tr. 147)

"* * * The statute which provides that no bill of sale of personal property shall be valid as against existing creditors, where the property is left in the possession of the vendor, unless the

bill of sale is recorded in the auditor's office of the county in which the property is situated within ten days, does not say within ten days after the bill of sale is delivered, but '*within ten days after such sale shall be made.*' Unquestionably, the sale of the automobile in this case was made, and written proof of it executed and delivered by Mr. Meyer to the appellant on October 2, 1919. The second bill of sale, claimed to have been delivered about October 17 or 18, and which was executed and acknowledged on October 2, was ineffectual to prevent the running of the ten-day period after the sale was made as provided in the statute."

Schloss v. Stringer 113 Wash. 529, 532, 533; 194 Pac. 577.

Thus, the ten-day period begins to run from the date on which the sale was actually consummated, irrespective of whether some subsequent bill of sale is executed. It is undisputed that Renfro-Wadentsein executed the above contract on March 23, 1928 (Tr. 20). It is also true that Rothschild received manual delivery of the contract on March 23 (Tr. 20). Ketcham & Rothschild signed the contract March 30, 1928 (Tr. 20). It is to be remembered that cross appellants drafted the contract (Tr. 4). It is not disputed that the terms of the consignment contract contemplated a sale back by the bankrupt to both petitioners of merchandise of petitioners theretofore held by

bankrupt (See Petitioners' brief, page 10). Paragraph 9 of the contract is unambiguous and speaks for itself and unless it was *modified* by the letter of March 23, introduced over trustee's objection, a sale was clearly consummated on March 23 from Renfro-Wadenstein to Ketcham & Rothschild. When paragraph 9 was inserted in the contract and the consignment contract was signed, it was clearly intended to mean immediate cancellation of the said indebtedness, and at that time it was thought that was to the interest of petitioners. The letter of March 23, giving bankrupt's misinterpretation of the proposed contract, was introduced as a result of an afterthought in an attempt to avoid the danger that otherwise the parties would be held to the letter of their contract, and that it would be decided that the sale was consummated on March 23, 1928. The letter was not sued upon by petitioners as a modification of the contract and Irwin, in his deposition (Exh. 55), in three different places, at pages 20, 26-27 and 65, states that the contract of consignment covered and contained the whole agreement between the parties.

Furthermore, at the time the contract was executed, Rothschild had been in Seattle for three days (Tr. 20). The property conveyed back comprised all the furniture of his manufacture on bankrupt's floor and an approximate figure was taken from the stock cards while Rothschild was in Seattle (Tr. 21, 43). There was nothing further to do except the ministerial act of

listing the furniture in detail. No segregation of the furniture was necessary in Ketcham & Rothschild's case. Wadenstein testified that the contract was signed by Ketcham & Rothschild while Rothschild was in Seattle (Tr. 39).

The fact that a detailed list of the furniture was not attached to the contract makes no difference. It is fundamental that where a contract is complete except as to mere formality, the date of the contract is from the time of its completion as to the essentials and it does not date from the time of the completion of the formality. This is so even where the contract makes express mention of the formalities which are to be completed. In *Granger & Co. v. Louisville Cornice, Roofing & Heating Co.*, 116 S. W. 753, a bid was made for a contracting job and was accepted as follows:

> "Accepted in conformity with contract to be made hereafter."

The court said that the latter words:

> "Did not make his acceptance merely conditional. All that was contemplated by that language was that a formal contract should be drawn between the parties. That this construction of the language is correct is shown by their subsequent conduct. The contract of March 3, which plaintiff claims was not signed until March 26, simply embodied in a formal and legal way the provisions of the proposition theretofore ac-

> cepted. This contract did not add to nor subtract from plaintiff's liability on its proposition of January 5. By that proposition it was already bound."

Similarly, in *Sellers v. Greer* (Ill.) 50 N. E. 246, S. and G. were in business together. The business did not progress satisfactorily and S. offered to purchase G's share. That proposition was put in writing in which the details of the proposed purchase were enumerated, and the agreement was headed "Outline of Proposition between Howard Greer and Morris Sellers." At the end of this writing there was the following statement:

> "This agreement to be put in proper form at as early a date as possible pending the return of the company's attorney to draw up the necessary releases, etc."

The writing was then signed "Morris Sellers, Tuesday, September 4, 1894." The court stated:

> "It will be observed that appellee did not sign the contract, and hence it is contended that the contract is not mutual. It appears, however, that the contract was delivered by Morris Sellers, appellant, to appellee on the day it was executed, and that appellee accepted the contract and agreed to its terms and conditions. The acceptance of the contract by appellee assenting to its terms, holding it, and acting upon it as a valid instrument, may be regarded as equivalent

to its formal execution on his part, as held by this court in *John v. Dodge*, 17 Ill. 442, and *Vogel v. Pekoc* (Ill.) 42 N. E. 386."

To the same effect are:

Harland v. Logansport, 32 N. E. 930;
McPherson et al. v. Fargo (S. D.) 74 N. W. 1057;
Johnston v. Trippe, 33 Fed. 530.

Upon acceptance of the contract on March 23rd, Ketcham & Rothschild could have enforced the same against Renfro-Wadenstein.

Vassault v. Edwards, 43 Calif. 465.

In any event, Ketcham & Rothschild signed the contract March 30, at the latest (Tr. 20), and immediately shipped merchandise under the consignment arrangement (Tr. 22). The testimony is conclusive from Wadenstein that the debtor treated the furniture attempted to be conveyed back from the date of the consignment agreement as consigned furniture (Tr. 49). The furniture was therefore intended by the parties to be the property of Ketcham & Rothschild from that date. Ketcham & Rothschild treated the contract in that light for they made shipments of furniture long prior to delivery of the bill of sale dated April 16 (Exh. 9, Tr. 30). The shipments referred to from Ketcham & Rothschild are represented by the invoices of April 2 and April 7 (part of petitioners' Exh. 3) and demonstrate that Ketcham &

Rothschild treated the consignment agreement as fully effected in all respects March 30, 1928, and operating on the furniture conveyed back as well as furniture subsequently shipped. See *Hosner v. McDonnell*, 114 Wash. 489, 195 Pac. 231; *Phillips v. Moore*, 71 Me. 78. Even assuming that the parties were under the eroneous belief that it was advisable later to execute another bill of sale, such is wholly immaterial in determining the end of the ten day period for recordation.

Schloss v. Stringer, 113 Wash. 529, *supra.*

Ketcham & Rothschild are in the unique position of claiming where it suits their purposes that the consignment agreement became effective March 30, 1928, and at the same time taking the position that as to such portions thereof that now appear burdensome to them it did not take effect until some time later. The great bulk of the Ketcham & Rothschild shipments under the so-called consignment arrangement was made on April 2 and April 7. If the consignment contracts were then in effect, certainly a sale had been made either on March 23 or March 30 unless the letter of March 23 *modified* the contract. It is of course admitted that the Ketcham & Rothschild bill of sale was not recorded until April 24, 1928 (Tr. 139).

So far as Ketcham & Rothschild's cross appeal is concerned it is rested upon the letter of March 23. That letter reads as follows:

"Referring to the attached memorandum of agreement:

"*It is our understanding* that we are to furnish, shortly after the first of the month, an inventory of all your merchandise on hand; that we also are to furnish bill of sale which will act as a transfer back to your company of this merchandise, and that any difference in the amount of the account will be taken care of in three equal payments, thirty, sixty and ninety days.

"This refers in particular to paragraph No. 9." (Italics supplied)

The letter is signed by Renfro-Wadenstein, but is not signed by Ketcham & Rothschild (Exh. 26, I. D.; Exh. 1). Cross appellant complains that the District Court failed to consider this letter. Such is not the case. The District Court stated:

"After the execution of the agreement the relation of the parties and the merchandise was established, and neither had the right to change or give to the agreement its own interpretation." Citing authorities. (Tr. 235)

It is obvious in conjunction with this letter, first, that it is merely an expression of the understanding of one party to the contract ("it is our understanding"); second, that it does not express a contractual relationship; and third, that it does not modify paragraph No. 9 of the contract.

"After a contract was made between defend-

> ant and the individual contestants, including the plaintiff, the defendant could not change the rights of the contestants thereunder through its misinterpretation of the rules as published, nor did it have the right to change or give to the rules its own interpretation." *Mooney v. Daily News Co.* (Minn.) 133 N. W. 573.

In *Sturtevant Co. v. Cumberland, D. & Co.*, 68 Atl. 351, there was a contract of consignment made by letters in which no mention was made as to insurance by the consignee. On the invoices sent by consignor there were statements requiring the consignee to insure. The court stated:

> "When a contract has been entered into between two parties, neither party alone has the right to add to it new terms or conditions. Such attempts are nullities and carry with them no legal obligation to be respected or obeyed by the other party; for if the consignor can add one, he can add a dozen." Page 355.

See also:

> *Newhall Land & Farming Co. v. Hogue, Kellogg Co.*, 204 Pac. 562.

Thus it is apparent that an agreement would be necessary between the two parties. It is claimed that the letter was written at the oral request of Ketcham & Rothschild, but the letter is not signed by them and is therefore not a written agreement between the

parties. Cross appellants are not suing on an oral contract, but upon the written agreements. Furthermore Section 5827 Remington Compiled Statutes, *supra*, constitutes a portion of the statute of frauds. An oral agreement cannot modify a writing under the statute of frauds.

Woolen v. Sloan, 94 Wash. 551, 553;
Coleman v. St. Paul & D. Lbr. Co., 110 Wash. 259;
Abell v. Monson, 18 Mich. 306.

It is elementary that where a written contract is unambiguous in its terms, parol evidence of the intention of the parties plays no part in determining the effect of the contract. No reference is made in the instant contract to the letter of March 23. The contracts are signed, dated and unambiguous as to sale. The letter of March 23 is at best merely a statement of the understanding of one party thereto as to the agreement between the parties. It makes no attempt to *modify* paragraph 9. Furthermore, if the principal contract was not complete until March 30, the letter was merged therein and became merely a part of the negotiations between the parties. The statement that the bill of sale "will act as a transfer back to your company" is emphasized by petitioner. Under the decision in *Schloss v. Stringer*, *supra*, this provision, even if a part of the contract, would merely contemplate a carrying out of paragraph 9 as to formality and would not prevent the ten day period from run-

ning from March 23 when the sale was actually consummated.

Furthermore, Rothschild testified that the consignment contract was signed without any modification, without any reservation (Tr. 279). The letter of March 23 was introduced over the trustee's objection, the original transcript of the testimony being included in this record (Tr. 274-279 incl.). It will be observed from the original transcript of testimony that Rothschild had the opportunity, not only to make the letter a complete contract, but also clearly to indicate that it modified Paragraph 9 (Tr. 277). Nevertheless, the letter merely bears an indication of the dealer's interpretation of the contract.

As to the Ketcham & Rothschild contract, therefore, the sale was completed March 23 or at the latest on March 30. Ketcham & Rothschild definitely accepted the contract on March 23, again on March 30 and again on April 2 and April 7. Recordation of the bill of sale was April 24. The letter was no modification of the contract and the subsequent execution of the bill of sale does not cure the defects of failure to record within the ten day period.

The merchandise never left the possession of dealer (Tr. 52). See *infra* under Irwin Contract.

II.

As against the trustee, the transfer from dealer to Irwin & Company was invalid.

The Irwin bill of sale was not recorded (Tr. 6. Cross appellants' brief, p. 68). The only contention on behalf of Irwin is that there was sufficient change of possession of the furniture to avoid the provisions of Section 5827, Remington's Compiled Statutes, *supra.* Yet the only basis for this contention is a change of relationship alleged to have taken place between the parties. Assuming this change of relationship did take place, which the trustee emphatically denies, the only evidence thereof were the secret consignment contracts and bookkeeping entries subsequently made. There was no indication given to the public that there had been a transfer of title. There was no separation of the furniture on the dealer's floor (Tr. 17, 33, 34). Utmost secrecy was attempted in connection with the consignment (Tr. 30, 31). Mere bookkeeping entries are not sufficient notice to the outside world. The provision of the statute is perfectly plain. A transfer of personal property is wholly ineffectual as against existing creditors unless there is a sufficient change of possession to notify the world, or there is constructive notice by recording. We do not claim that manual delivery is necessary to effect a change of possession with articles like those involved here, but we do insist the change must be of

such a character that notice of change of ownership is conveyed to the world. Cross appellants' rely upon the *Haskin's* case and the *Speicker* case (Page 69). In the *Haskin's case*, 93 Wash. 63, 66, an agent of the defendant bank went to the mill and was authorized to take possession of the lumber, then in the yard, to sell the same, and credit the amount received upon the note. The agent checked the lumber, employed someone to haul the lumber away. Snow prevented the hauling, except of a small portion of the lumber, but there was manual delivery of at least a portion and there was consequent notice to the outside world of the change of possession.

In the *Speicker* case, 134 Wash. 280, *actual possession* was taken of a farm together with the chattels thereon (Page 285). A more recent case is *Waddell v. Roberts*, 139 Wash. 273, 276, 279; 246 Pac. 755. This case sustains the trustee's position. In *Hyman v. Semmes* (C. C. A. 6th) 26 Fed. 2nd 10, an unrecorded bill of sale was involved.

> " * * * Possession of the lumber having been surrendered and (there being) finding that the cards or notices were merely affixed to the lumber 'in an indefinite and irregular manner, apparently without any effort to maintain the notices upon the lumber or to notify third parties of the ownership of the same,' we are constrained to hold that such notices would not make effective an agreement or contract expressly declared null and

void as to existing and subsequent creditors by the statutes of Tennessee."

See also Pages 32-37 inclusive, Trustee's opening brief.

III

The attempted transfer of title would be a preference.

The trustee is in the position of a creditor and is entitled to the benefits of the state law in the same manner as any existing creditor. The District Court stated otherwise (Tr. 232), but failed to cite a single authority in support of its conclusion. The District Court's conclusion failed to take into account the distinction between the right of a party to avail himself of the bankruptcy act and the subsequent right of the trustee of the bankrupt's estate in administering the same.

"Section 70e of the Bankruptcy Act provides: 'The trustee may avoid any transfer by the bankrupt of his property *which any creditor of such bankrupt might have avoided*, and may recover the property so transferred or its value from the person to whom it was transferred unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery, any

court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.'

"This section, as construed by this court, gives the trustee in bankruptcy a right of action to recover property transferred in violation of state law. *Security Warehousing Co. v. Hand,* 206 U. S. 415, 425, 426; 51 L. E. 1117, 1124; 27 Sup. Ct. Reports 720; 11 Ann. Cas. 789; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545; 548; 54 L. E. 610, 611; 30 Sup. Ct. Rep. 412.

"And a right of action under this subdivision is not subject to the four months' limitation of other sections (60b, 67e) of the bankruptcy act. Under this subdivision if a creditor could have avoided a transfer under a state law, a trustee may do the same. *Re Mullen,* 101 Fed. 413 (Opinion by Judge Lowell); 1 Loveland, Bankr. 4th Ed. 786, 787; *Collier, Bankr.*, 11th Ed. 1178, and cases cited in Note 439."

Stellwagen v. Clum, 62 Law. Ed. 507, 511; 245 U. S. 605, 606, 614.

"And certainly, in view of the provisions of Section 70e of the bankruptcy act, Congress did not intend to permit a conveyance such as is here involved to stand which creditors might attack and avoid under the state law for the benefit

of general creditors of the estate." L. E. 513; U. S. 618.

The *Stellwagen* case was approved in *Stratton v. New*, 75 L. E. 617, 623 (1930). This court has definitely committed itself to the above effect.

Davis v. Willey (C. C. A. 9th) 273 Fed. 397.

See also:

Williamson v. Leith et al. (C. C. A. 5th) 36 Fed. 2nd 643, 645.

Cross-appellants' cases (Page 62) fail to support their contention. *U. S. v. State of Okla.*, 67 L. E. 638, was an action under a federal statute which statute made the federal bankruptcy act the test of insolvency for the purpose of enforcement of rights under that statute. In the *Chappell* and *Walker* cases, no question was raised as to a state statute. The *McGill* case, 243 Fed. 637, definitely sustained the trustee's position and held that the trustee was entitled to recover as well under the New York statute as under the bankruptcy law (Pages 650-653).

A case similar in circumstance to the instant cases was that of *J. R. McCrory*, trading as J. R. McCrory Company, bankrupt (U. S. D. C., Pa.) 11 Amer. Bankr. Rep. N. S. 437, in which chains had been sold to bankrupt and bankrupt could not pay for same. Bankrupt had sold to customers a portion of the chains. It was agreed that the remaining portions should be held on consignment. The court stated:

"At the time such agreement was entered into, no change of position occurred, nor by marking or otherwise was notice given to creditors that the chains in question were not the property of the bankrupt. Under Section 47 of the bankruptcy act, the trustee in bankruptcy, as to all property in the custody or coming into the custody of the bankruptcy court, is deemed to be vested with all the rights of the creditor holding a lien by legal proceedings. By the law of Pennsylvania, a transfer of property such as was made in the instant case is fraud as against creditors."

See also:

Joseph v. Winakur, 13 Amer. Bankr. Rep. N. S. 259;

In re Franklin Lumber Co., 187 Fed. 281, 283;

In re Carpenter, 125 Fed. 831, 835.

INSOLVENCY

Bankrupt with the knowledge of claimant was insolvent March 23, 1928, and thereafter. The referee's finding to this effect (Tr. 88, 89, 101) is well supported by the evidence. Upon the testimony of Wadenstein and the deposition of Irwin, it is demonstrated beyond successful contradiction that at that period the bankrupt was, and for a considerable time prior thereto, had been over-expanded, under-capitalized and unable to pay its debts in the ordinary course as

they matured (I. D. 59, 68, 69; Tr. 40, 46, 47). The condition in which the two claimants found themselves in March was one into which they had gradually become involved until it was sufficiently acute to require drastic action on their part. They both knew at that time and later that bankrupt was hypothecating its accounts with discount companies (I. D. 54, 56, 63, 69, 87. See discussion of insolvency in trustee's opening brief Pages 42, 43, 44 and references to transcript made therein. See also I. D. 3, 4, 5, 57, 58, 59 and Exhs. attached to I. D. 4, 14, 16, 19, 24 and Exh. 45, several parts, 46, 47). There was also introduced in evidence a letter from another manufacturer creditor expressing impatience at being unable to collect anything on his account (Trustee's Exh. "F"). And Wadenstein admits that the inability of his firm above referred to was not confined to these two claimants, but extended to the firm's creditors generally (Tr. 40, 43, 44). Wadenstein had been exceedingly optimistic and enthusiastic, but

> "There was no question that we were operating with too little capital * * *. As far as paying all of our bills in the course of our business, I don't think there was a time in the history of our business, when we could have done that. *There was not a time in the history when we could pay all our bills and stay in business.*" (Wadenstein, Tr. 46; see also Tr. 47)

> "A corporation which cannot pay its debts in the ordinary course of business is insolvent, even though the reasonable value of its assets may exceed the amount of its liabilities." *Brooks v. Parsons Co.*, 124 Wash. 300, 303; 214 Pac. 6; see also authorities to the same effect cited Page 45 of trustee's opening brief.

It is equally elementary that an insolvent corporation may not prefer its creditors; that its property on insolvency becomes a trust fund for the benefit of all its creditors to be equally and ratably distributed among them.

> *Thompson v. Huron Lbr. Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25;
> *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166;
> *Benner v. Scandinavian Amer. Bank*, 73 Wash. 488, 131 Pac. 1149;
> *Jones v. Hoquiam Lbr. & Shingle Co.*, 98 Wash. 172, 167 Pac. 117;
> *Simpson v. Western Hdwe. & Metal Co.*, 97 Wash. 172;
> *Williams v. Davidson*, 104 Wash. 315, 176 Pac. 334;
> *Woods v. Metropolitan Natl. Bank*, 126 Wash. 346, 349, 218 Pac. 266.

Cross-appellants attempt to avoid the inexorable result of the above cases by insisting that a valid present consideration was paid the dealer (Page 64). The contract itself recites that the consideration for

the conveyance of the furniture is the cancellation of the indebtedness of the dealer to the manufacturer (Tr. 147, Par. 9). No other consideration is recited, so that the consideration was not a present one but was the cancellation of an antecedent indebtedness.

Cross-appellants argue (Page 65) that the consideration was the shipment of more furniture by manufacturers to dealer. Shipment, however, was entirely at the option of the manufacturer (Tr. 113, Par. 1; Tr. 144, Par. 1). The contract could be terminated at any time and payment demanded for the merchandise (Tr. 116, Par. 10; Tr. 147, Par. 10). Consequently, manufacturers did not bind themselves to render any assistance to the dealer. Furthermore, these claimants were not the only manufacturers of high-grade furniture from whom Renfro-Wadenstein might have obtained merchandise. Other concerns had given Renfro-Wadenstein extended credit and could supply high-grade furniture (Tr. 40). The Johnson firm was an example (Trustee's Exh. F).

In addition, instead of conferring a favor upon dealer by shipment of further furniture, manufacturers in reality burdened dealer with an obligation to pay for the merchandise upon manufacturer's demand. Such was the effect of Paragraph 10 of the contract. Conveyance of the merchandise and the execution of the "consignment" contract were required, as the record amply shows, because of the fear of the manufacturers that they would not procure

payment for the merchandise. Of the cases cited by cross-appellants, the *Terhune* case is adequately distinguished by the referee (Tr. 219, 220). Of the other Washington cases cited by cross-appellant, there was in no instance an injury to other creditors or a depletion of the assets of the insolvent and in the *Lloyd* case it is stated that the theory of the trust fund doctrine is the denial of equality of advantage and in the *Hoppe* case it is stated that transactions of this character are subject to severe scrutiny by the courts. Obviously, other creditors have been denied an equality of advantage if these claimants may reclaim the merchandise shipped prior to April 1, 1928. The *Fogg* case implies first, a bona fide purchaser, and second, a valuable present consideration.

IV

Accounts and proceeds may not be reclaimed.

The accounts and proceeds were not trust property, either under the contract or under the operations of the parties. It was clearly intended that title to the furniture in any event passed whenever Renfro-Wadenstein made a sale. The billing of the invoice price at a discount of two per cent due the 20th of the following month, and the acceptance of notes and cash by claimants evidenced that debtor thereafter owned the account represented by such sale (Tr. 14, 15). Wadenstein testified:

"As our sales were reported to the claimants,

they billed us as I have testified, and on our side as we sold this merchandise, we entered that merchandise on our books in the regular course of business as soon as our bookkeeper could get to it and *it was added to our accounts receivable.* These claimants were then entered on our books as our *creditors* to the invoice amount of our merchandise we had sold. We made no distinction in the transactions I have discussed between the merchandise that was transferred back or attempted to be transferred back to claimant and the merchandise that they subsequently shipped to us; * * *." (Tr. 51)

The accounts receivable were discounted and intermingled with the general proceeds of dealer's business just as had been done before the consignment arrangement (Tr. 54, 56, 58, 59). When the furniture was sold the accounts receivable became assets of Renfro-Wadenstein (Tr. 56). These accounts could be assigned as collateral to the manufacturers by Renfro-Wadenstein (Tr. 56, 114, Par. 5; Tr. 146, Par. 5). It would have been very easy for petitioners in the consignment agreement to have forbidden the discounting of these accounts, a practice which was known by them to exist, but no protest was made thereto and we find Irwin saying in his deposition, Page 75:

"Q. In other words, after they sold their

merchandise, you made no effort to find out what they did with that money?

A. No, we had a contract with them and they were to have made settlement with us in accordance with the terms of that contract. We had a basis for *payment.*"

"The unrestricted authority which he unquestionably possessed as regards to the terms of sale to be made, very strongly tends to give the contract the character of one of sale. The stipulation that the proceeds of sale, whether in notes, cash or accounts, shall be the property of the plaintiffs and held in trust for them, can scarcely be said to militate against this view, and plaintiffs do not in any event agree to take accounts in payment or notes which are such as the contract describes. When, therefore, the contract provides that the proceeds of sales made by the plaintiffs shall be the property of the plaintiffs, it seems plain that what is contemplated is that they shall be security merely." *Adriance v. Rutherford* (Mich.) 23 N. W. 718.

The customers' accounts in practically every instance represented various pieces of furniture only a few of which were referable either to the bills of sale or to the consignment arrangement (Tr. 54, 80, 82). In the assigned accounts, there was no designation of the name of the manufacturer (Tr. 80, 82). Officers of the discount firms denied any knowledge of the

consignment arrangement (Tr. 80, 82). Cross-appellants claim that the assignments to the discount companies were invalid. The discount companies are not before this court and we are not defending them in this proceeding. However, as to them, this can be said in fairness. As Irwin put it in his deposition, petitioners were willing to go to these lengths with full realization of the debtor's weakened position financially because "he was willing to run *that hazard* for the purpose of doing the increase in business with people that are in that condition" (Irwin's Dep. 69). Both petitioners made it possible for bankrupt without objection on their part, but with full knowledge, to hypothecate these accounts and realize money therefrom with which to continue business and, to sell petitioners' furniture and augument petitioners' profits. Certainly as to these accounts and cash, petitioners are now in a poor position to claim preference and priority either at the expense of the general creditors or at the expense of the discount companies whose money in good faith was brought into the business.

> "There is another principle involved, the well established principle of equity that when one of two persons must suffer by the fault of a third, the loss shall fall upon him who has enabled such third person to do the wrong * * *. They (petitioners in this instance) could and should have taken exclusive possession of the property and not left them in possession and apparent

ownership * * *. Such laches and negligence prevents them from setting up the bill of sale."
Bonnivier v. Cole, 90 Wash. 526, 530.

Petitioners have the burden of establishing their title and ownership of the furniture on hand and their superior right to the proceeds of sale and collections therefrom, and such proceeds must be traced into the possession of the trustee in bankruptcy.

TRACING

With the exception, possibly, of a small amount of cash realized by S. T. Hills from the sale of specific furniture, petitioners have wholly failed even to attempt to trace any of these proceeds or cash into the hands of the trustee in bankruptcy. The cash received by the assignee for the benefit of creditors was approximately $300.00 (Tr. 77). The accounts which petitioners are claiming have been from time to time realized by the bankrupt through discounting, and the proceeds inextricably intermingled in their business. It is our position that petitioners cannot follow the proceeds of accounts or the accounts themselves into the hands of the trustee, unless the petitioners can trace the trust fund in kind or in specific property into which it has been converted and demonstrate that the trustee in bankruptcy has received the benefits thereof and that it had come into his hands.

In the *John Deere Plow* case, 137 Fed. 802, the agreement was held to be a consignment. It differed

in important particulars in that regard from the agreements involved herein, for the bankrupt was appointed as "their authorized agent for the sale on commission of the consigned goods." The agreements there provided also that "all proceeds of sale, whether cash or notes, shall be kept separate and distinct from second party's other business." Here we find no such provisions and yet the court refused to allow petitioners' priority over other creditors to funds in the hands of the trustee for the reason that it did not appear that any of the money received from the sale of goods actually passed into the hands of or was held by the trustee. The court stated:

> "The owner of a fund which has been misappropriated by one who held it in trust cannot follow it in the hands of the trustee unless he can trace the trust fund *in kind*, or *in specific property* into which it has been converted, or if the fund has been mingled with the trustee's other property, establish a charge on the price of such property for the amount of this fund. In other words, he can secure a preference out of the proceeds of the estate of insolvents only where he can trace the trust fund or property in its original or some substituted form in the estate which comes into the hands of the trustee."

The court said that this preference did not depend on the construction of the contract, but rather upon the rule of preference in equity and that the Federal

decisions control as to that over the decisions of the state court.

> "There is no recognized ground upon which equity can pursue a fund and impose upon it the character of a trust, except upon the theory *that the money is still the property of the plaintiff.* If he is permitted to follow it and recover it, it is because it is his own either in the form in which he parted with its possession or in a substituted form. We are unable to assent to the proposition that *because a trust fund has been used by an insolvent in the course of his business,* the general creditors of the estate are by that amount benefitted, and that therefore equitable consideration requires that the owner of the fund be paid out of the estate to their postponement or exclusion * * * and even if it is proved that the trust fund has been but recently disbursed and has been used to pay debts which otherwise would be claimed against the estate, there would be manifest inequity in requiring that the money so paid out should be refunded out of the assets, *for in so doing general creditors whose demands remain unpaid are in fact contributing to the payment of creditors whose demands have been extinguished by the trust fund.* Both the settled principles of equity and weight of authority sustain the view that the plaintiff's right to *establish a trust* and recover his fund

must depend upon his ability to prove that his property is in its original or a substituted form in the hands of the defendant." *Spokane County v. First National Bank*, 68 Fed. 979.

See also:

Zenor v. McFarlin, C. C. A. 238 Fed. 721.

A provision in the contract *In re Reynolds*, 203 Fed. 162, providing that the agent on the first day of each month should settle for the goods sold the previous month in cash or by his note, made the proceeds of the sale up to that time the property of the principal and *thereafter the property of the agent.*

The cases cited by cross-appellants (Page 74) are different in character from the instant cases. In the *International Agriculture Corp.*, *Bartling Tire Co.*, and *McGehee* cases there was involved only the simple proposition of certain specific accounts in the hands of the trustee in bankruptcy representing the sale of consigned merchandise. These accounts had not been discounted and the proceeds intermingled in bankrupt's business. In the *McGehee* case the court stated:

> "Where money had been received from the fertilizer and had gone into the general fund of McGehee, of course there would be no right on the part of the Troup Company."
>
> 166 Fed. 928, 929.

In the *Taft* case the funds were kept separate and apart from the general fund with the object in view

of enabling the consignor to trace the proceeds. 133 Fed. 511, 513, 514.

In re Kurtz (D. C. Penn.) was an action to compel bankrupt to pay over to the trustee certain funds.

Eiler's Music House v. Fairbanks, 80 Wash. 379, relied upon by claimants, stresses the necessity of tracing the funds. (See Page 75 cross-complainants' brief).

CONCLUSION

If the principal contracts are held not to be consignments, petitioners' entire case for reclamation fails. In such event a discussion on the cross appeal has no materiality.

The sale from Renfro-Wadenstein to Ketcham & Rothschild of furniture shipped prior to April 1, 1928, was consummated March 23, 1928. The contract was definitely accepted by Ketcham & Rothschild on March 23, again on March 30 and again April 2 and April 7. The bill of sale was not recorded until April 24. The sale was complete more than ten days prior to recordation, and was therefore invalid as to existing creditors. There was never any change in possession of the merchandise or anything to indicate to the outside world that there had been a transfer of title prior to recordation of bill of sale.

As to the Irwin contract, it was never recorded and there was no change in the possession of the merch-

andise and the contract was not finally completed until September 5, 1928.

These attempted transfers would in any event be preferences. The trustee stands in the position of an existing creditor; the dealer was insolvent at the time of the transfer; an insolvent corporation may not prefer its creditors; no present consideration was given for the conveyance. In fact a present obligation was incurred by dealer upon the consummation of the consignment contract which obligation imposed upon dealer the burden of being compelled to pay for the merchandise upon demand by manufacturer.

The accounts and proceeds whether considered in the light of the original contracts or in the operation of the parties thereunder did not constitute a trust fund but were at all times the property of Renfro-Wadenstein. This is apparent both from the action of the dealer and of the manufacturer. In any event there is no evidence to be found in the record tracing the fund in kind or in specific property into the hands of the trustee. Cross-appellants' brief makes no reference to such evidence.

We respectfully submit that these entire proceedings should be determined upon the basis that the principal contracts were not consignments but were in effect sales. We submit further that the decisions of the Referee and of the District Court on the subject matter of the cross appeal are fully sustained by

the evidence and the law and that the petitions for reclamation should be denied *in toto*.

Therefore, we respectfully request an order of this Court modifying paragraphs numbered 1, 2, 3 and 5 of the District Court's order, and denying reclamation *in toto*, and awarding the trustee his costs herein.

Respectfully submitted,

EGGERMAN & ROSLING,
D. G. EGGERMAN,
EDW. L. ROSLING,
Solicitors for Cross Appellee.

W. S. GREATHOUSE,
Of Counsel.

INDEX

INDEX OF SUBJECT MATTER

Accounts Receivable, discounted 29

Bill of Sale, when to be recorded..... 7, 8, 9

Brief of Argument..... 6

Conclusion ..... 36 *et seq.*

Consideration for Transfer..... 26–28

Contracts, Ketcham & Rothschild completed
when 13, 14, 18
No Modification 10, 15–18

Formalities After Sale..... 10–14 incl., 17

Insolvency 24, 25, 26

Letter of March 23rd..... 14, 15
Not Pleaded 16, 17

Possession, No Change of..... 18, 19–21

Preference 21, 26

Proceeds 28–36

Recordation of Bill of Sale..... 7–9

Statute, R. C. S. 5827..... 7, 8

Tracing 32–36

Transfers Invalid
To Ketcham & Rothschild..... 7–9
To Irwin & Company..... 19–28

Trustee in Position of Creditor..... 21–24
Entitled to Benefits of State Law..... 21–24

Trust Property, No..... 28–32

INDEX OF AUTHORITIES

CASE AND CITATION	Page
Abell v. Monson, 18 Mich. 306	17
Adriance v. Rutherford (Mich.) 23 N. W. 718	30
"Bankruptcy," Collier, 11th Ed., 1178, Note 439	22
"Bankruptcy," 1 Loveland, 4th Ed. 786, 787	22
Bartling Tire Co. v. Coxe, 288 Fed. 314	35
Benner v. Scandinavian Amer. Bank, 73 Wash. 488, 131 Pac. 1149	26
Bonnivier v. Cole, 90 Wash. 526, 530	32
Brooks v. Parsons Co., 124 Wash. 300, 303; 214 Pac. 6	26
Carpenter, In re, 125 Fed. 831, 835	24
Chappell, In re, 113 Fed. 543	23
Coleman v. St. Paul & D. Lbr. Co., 110 Wash. 259	17
Collier, "Bankruptcy," 11th Ed. 1178, Note 439	22
Conover v. Hull, 10 Wash. 673, 39 Pac. 166	26
Davis v. Willey (C. A. 9th) 273 Fed. 397	23
Eiler's Music House v. Fairbanks, 80 Wash. 379	36
Fogg v. Blair, 133 U. S. 534	28
Franklin Lbr. Co., In re, 187 Fed. 281	24
Granger & Co. v. Louisville Cornice Roofing & Heating Co., 116 S. W. 753	11
Harland v. Logansport, 32 N. E. 930	13
Haskins v. Fidelity Natl. Bank, 93 Wash. 63	20
Hoppe v. First Natl. of Renton, 137 Wash. 41, 241 Pac. 662	28
Hosner v. McDonnell, 114 Wash. 489, 195 Pac. 231	14
Hyman v. Semmes (C. C. A. 6th) 26 Fed. 2nd 10	20

CASE AND CITATION Page

Intl. Agri. Corp. v. Sparks, 250 Fed. 318 35

John Deere Plow Co. v. David, 137 Fed. 802 32

John v. Dodge, 17 Ill. 442 13

Johnston v. Trippe, 33 Fed. 530 13

Jones v. Hoquiam Lbr. & Shingle Co., 98 Wash. 172, 167 Pac. 117 26

Joseph v. Winakur, 13 Amer. Bkpt. Re. N. S. 259 24

Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 L. E. 610 22

Kurtz, In re, 125 Fed. 992 36

Lloyd v. Sichler, 94 Wash. 611, 162 Pac. 45 28

Loveland, "Bankruptcy," Vol. 1, 4th Ed., 786, 787 22

McCrory, In re J. R., 11 Am. B. R. N. S. 437 23

McGehee, In re, 166 Fed. 928 35

McGill v. Commercial Credit Co., 243 Fed. 637 23

McPherson v. Fargo, 74 N. W. 1057 13

Mooney v. Daily News Co., 133 N. W. 573 16

Mullen, In re, 101 Fed. 413 22

Newhall Land & Farming Co. v. Hogue, Kellogg Co., 204 Pac. 562 16

Phillips v. Moore, 71 Me. 78 14

Remington's Compiled Statutes, 5827 7

Reynolds, In re, 203 Fed. 162 35

Schloss v. Stringer, 113 Wash. 529, 194 Pac. 577..9, 14

Security Whse. Co. v. Hand, 206 U. S. 415, 51 L. E. 1117 22

Sellers v. Greer, 50 N. E. 246 12

CASE AND CITATION	Page
Simpson v. Western Hdwe. & Metal Co., 97 Wash. 172	26
Speicker v. First Natl. Bank of Odessa, 134 Wash. 280	20
Spokane County v. First Natl. Bank, 68 Fed. 979	35
Statutes, R. C. S. 5827	7
Stellwagen v. Clum, 62 L. E. 507, 245 U. S. 605	22
Stratton v. New, 75 L. E. 617	23
Sturtevant v. Cumberland D. & Co., 68 Atl. 351	16
Taft, In re, 133 Fed. 511	35
Terhune v. Weise, 132 Wash. 2082, 231 Pac. 954	28
Thompson v. Huron Lbr. Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25	26
U. S. v. State of Okla., 67 L. E. 638	23
Vassault v. Edwards, 43 Cal. 465	13
Vogel v. Pekoc, 42 N. E. 386	13
Waddell v. Roberts, 139 Wash. 273, 246 Pac. 755	20
Walker, In re, 235 Fed. 285	23
Williams v. Davidson, 104 Wash. 315, 176 Pac. 334	26
Williamson v. Leith (C. C. A. 5th) 36 Fed. 2nd 643	23
Woods v. Metropolitan Natl. Bank, 126 Wash. 346, 218 Pac. 266	26
Woolen v. Sloan, 94 Wash. 551	17
Zenor v. McFarlin (C. C. A.) 238 Fed. 721	35

No. 6536

United States

Circuit Court of Appeals

For the Ninth Circuit.

LEE GET NUEY,

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration for the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amendment to Petition	13
Appearance of Respondent	12
Assignment of Errors	28
Certificate of Clerk U. S. District Court to Transcript of Record	34
Citation on Appeal	35
EXHIBITS:	
Exhibit "A"—Summary of Special Board of Inquiry	14
Exhibit "B"—Summary of Board of Review on Appeal from Decision of Special Board of Inquiry	22
Names and Addresses of Attorneys of Record	1
Notice of Appeal	26
Order Allowing Appeal	31
Order Denying Petition for Writ, etc.	25
Order Respecting Withdrawal of Immigration Record	32
Order to Show Cause	11
Petition for Appeal	27
Petition for Writ of Habeas Corpus	1
Praecipe for Transcript of Record	33

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Petitioner and Appellant:
RUSSELL P. TYLER, Esq., Kohl Bldg., San Francisco, California.

For Respondent and Appellee:
UNITED STATES ATTORNEY, San Francisco, Calif.

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

20,397–S.

In the Matter of the Application of LEE SHARE DEW for a Writ of Habeas Corpus for and on Behalf of His Son LEE GET NUEY, Ex SS. "PRESIDENT GRANT" 7/9/30.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable Judges of the District Court of the United States, Now Sitting in the Above Division of Said Court:

Now comes Lee Share Dew, the petitioner in the above-entitled proceeding, filing herein his petition for a writ of habeas corpus for and on behalf of his son, Lee Get Nuey, and respectfully shows:

I.

That your petitioner, Lee Share Dew, was born

in the United States of America and is a citizen thereof and is now a resident of the City and County of San Francisco, State and Northern District of California.

II.

That Lee Get Nuey, hereinafter, for the sake of brevity, referred to as the "detained person," and the person in whose behalf this petition is made, is the lawful and legitimate son of your petitioner and as such the said detained person is a citizen of the United States of America.

III.

That the said detained person is unlawfully imprisoned, [1*] detained, confined and restrained of his liberty by John D. Nagle, Esq., Commissioner of Immigration, at the Port of San Francisco, at the Immigrant Station of the United States, at Angel Island, California, or at some other place in the said Northern District of California, and that said detained person is about to be deported from the United States to China, to wit: on the "President Jackson," on or about the 24th day of October, 1930.

IV.

That the illegality of such imprisonment, restraint, detention and confinement, consists in this, to wit:

That said detained person made application to be admitted to the United States at the Port of San Francisco on or about the 9th day of July, 1930, as

*Page-number appearing at the foot of page of original certified Transcript of Record.

a citizen of the United States and as the lawful, legitimate son of your petitioner.

That subsequent to the said application to be admitted to the United States by the said detained person, as aforesaid, said detained person was denied and refused a fair hearing in good faith by the Secretary of Labor of the Government of the United States by a manifest abuse of discretion vested in him by law, and through error and mistake of law and against the spirit of the law and was denied his right to enter the United States, and in this respect your petitioner alleges:

(a) That said detained person arrived on or about the 9th day of July, 1930, on the steamship "President Grant" at the Port of San Francisco from China and made application to the Commissioner of Immigration at the port of San Francisco for admission to the United States as a citizen thereof and as the lawful, legitimate son of your petitioner.

(b) That thereafter, in pursuance to the rules and regulations of said Department, the said detained person was given a hearing before the proper immigration authorities touching his [2] right to enter the United States as a citizen thereof and as the lawful, legitimate son of your petitioner, and at such hearing and other hearings subsequent thereto testimony and documentary evidence was submitted on behalf of said applicant before said immigration officers touching his right to enter the United States, and at such hearing testimony was introduced and submitted bearing upon the legality

of the claims of said detained person and of the relationship existing between the said detained person and your petitioner, and at said hearing and other hearings subsequent thereto testimony and documentary evidence was submitted and introduced bearing upon the citizenship of your petitioner, and that thereafter the said commissioner found that the said applicant was not the son of your petitioner and was not a citizen of the United States by reason of the said relationship to your petitioner; that thereafter the said application for admission to the United States by the said detained person was denied by the said Commissioner of Immigration.

(c) That subsequent to the action by the said Commissioner of Immigration at the Port of San Francisco and denying the said application of the said detained person for admission to the United States as a citizen and lawful legitimate son of your petitioner, as aforesaid, the said detained person regularly appealed to the Secretary of Labor from said decision, and subsequent to the taking of said appeal, as aforesaid, the said Secretary of Labor denied the said appeal from the said decision of the said Commissioner of Immigration of the said Port of San Francisco, as aforesaid; that the facts relied upon in the said appeal to the said Secretary of Labor from the decision of the said Commissioner of Immigration at the Port of San Francisco, as aforesaid, consisted in this, to wit: That the said detained person was denied admission into the United States by the said Commissioner of [3]

Immigration at the Port of San Francisco, for the reason that said Commissioner as a result of said investigation, as aforesaid, was not satisfied from the testimony and the record that the said claims made by said detained person were true and that the said detained person was the lawful son of your petitioner and as such, a citizen of the United States.

(d) That the detained person has been and is denied a fair hearing in good faith, such as guaranteed to a citizen of the United States and in this respect your petitioner alleges that the Bureau of Immigration and the Secretary of Labor were unduly prejudiced by certain discrepancies in said record and particularly prejudiced against your petitioner by reason of the fact that in 1924 your petitioner gave the birth year of applicant as 1901 and on his return from China in 1925 gave the birth year as 1902 and further because of certain statements made by petitioner in 1924 regarding the children of applicant, and in this respect petitioner alleges that said record relied upon by the Bureau of Immigration and the Secretary of Labor is not clear and incomplete and that the said Bureau of Immigration and the Secretary of Labor have been further prejudiced by reason of certain alleged discrepancies in the testimony of applicant concerning a description of his home village in China, a statement concerning the school which he attended in China and certain testimony relative to members of the family of the said petitioner, all of which said testimony is not subject to any discrepancies

but is susceptible to be interpreted in substantial accord with the testimony of said applicant and other witnesses, and in this respect your petitioner alleges that all statements of said detained person, your petitioner and all other witnesses examined by the said Commissioner of Immigration at the Port of San Francisco, as aforesaid, together with all written and documentary evidence is in substantial accord and [4] establishes without variance or contradiction that the said detained person is the lawful, legitimate son of your said petitioner and as such is a citizen of the United States of America.

(e) That the report of the Immigration Inspector is not made a part of this petition for the reason that said report is classified in the Immigration Service as a privileged communication between the Immigration officials, and your petitioner is not permitted to see a copy of said communication or to procure a copy of the same for the purpose of attaching the same to this petition.

(f) That the Commissioner of Immigration and the Secretary of Labor have manifestly committed an abuse of discretion in the said cause against the said detained person in that all of the said alleged discrepancies in the said testimony adduced in the cause of the said detained person aforesaid, could not have been made the determining factor in denying his application to enter the United States, same being irrelevant and immaterial evidence, since the question for determination in said hearing was the relationship between the said detained person and

your said petitioner; that the evidence contained in the report and by all evidence both oral and documentary considered by the said Commissioner of Immigration and said Secretary of Labor, as aforesaid, proves conclusively and without contradiction that the said detained person is the son of your petitioner and that your petitioner is a citizen of the United States of America and that by reason of the relationship of said detained person to your said petitioner, the said detained person is a citizen of the United States of America.

(g) That the said Commissioner of Immigration and said Secretary of Labor committed an abuse of discretion in refusing the said detained person entry into the United States for the reasons herein alleged, it manifestly appearing from an examination of the said record, as aforesaid, that the said relationship between [5] the said detained person and your said petitioner is established without question and beyond contradiction by said evidence considered in behalf of the said detained person, as aforesaid.

(h) That your petitioner further alleges that the said record in the case of said detained person clearly establishes that said detained person was refused and denied a full and fair semblance of a full and fair hearing before the said Commissioner of Immigration at Angel Island, State and Northern District of California, and the Secretary of Labor, and that the denial of the appeal in said cause and the refusal to permit the said detained person to enter the United States was and is a mani-

fest abuse of discretion imposed by law in the said Commissioner of Immigration and the said Secretary of Labor and that the said ruling and rulings were, and each of said rulings was based upon error and mistakes in law and fact and against the spirit and letter of the law.

V.

That the proceedings so had from the time of the application of the said detained person to be admitted into the United States, up to and including the order of the said Secretary of Labor denying and dismissing the said appeal from the said decision of the said Commissioner of Immigration at the Port of San Francisco, as aforesaid, and directing the said Commissioner of Immigration to deport the said detained person to China, as aforesaid, and all orders, investigations, findings and recommendations of the said Commissioner of Immigration and said Secretary of Labor of the said Government of the United States, and all papers, documents and proceedings in said matter in the application of said detained person for admission into the United States, including all evidentiary matter consisting of former statements made by any and all witnesses, and all statements previously made by any or all [6] persons touching upon the relationship of the said detained person to your petitioner are, as your petitioner is informed and believes, and therefore upon such information and belief alleges, incorporated in the record of said detained person, for admission into the United States, as aforesaid, and are now in the possession of and subject to the con-

trol of the Secretary of Labor and all of which has been and now are inaccessible to your petitioner and that said detained person and your petitioner have been unable to obtain copies, or access thereto, and for said reason your petitioner is unable to accompany this petition with a copy of said record; that when said proceedings so had in regard and in respect to the said application of said detained person, as aforesaid, are available and are procured from said Commissioner of Immigration and the said Secretary of Labor, affiant requests that they be made a part hereof as fully as if a copy thereof was attached hereto at the time of the filing hereof.

VI.

That the said detained person has exhausted all rights and remedies and has no further remedy before said Department of Labor and that unless a writ of habeas corpus issue out of this court as prayed herein, and directed to the said John D. Nagle, Commissioner of Immigration, at the Port of San Francisco in whose custody the said body of the said detained person is, as aforesaid, the said detained person will be deported from the United States of America to China without due process of law on the steamship "President Jackson" on or about the 24th day of October, 1930.

VII.

That said detained person is a citizen of the United States of America for the reasons hereinbefore alleged and as such is entitled to a judicial inquiry

by this court concerning his rights and claims for admission into the United States as aforesaid. [7]

WHEREFORE, your petitioner prays that a writ of habeas corpus be issued by this Honorable Court, directed to and commanding the said John D. Nagle, Commissioner of Immigration at the Port of San Francisco, to have and procure the body of said detained person before this Honorable Court at its courtroom in the City and County of San Francisco, State and Northern District of California, at the opening hour of said court, on a day certain in said order; that the said alleged cause of imprisonment, detention, confinement and restraint of said detained person, and the legality or illegality thereof may be inquired into, and in order that in case the said imprisonment, detention, confinement and restraint are unlawful and illegal that the said detained person may be discharged from all custody, detention, imprisonment, confinement and restraint.

Dated, October 21st, 1930.

RUSSELL P. TYLER,
Attorney for Petitioner. [8]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Lee Share Dew, being first duly sworn, deposes and says: That he is the petitioner in the foregoing petition and makes and verifies said petition for and on behalf of his lawful and legitimate son, Lee Get Nuey, for the reason that the said Lee Get Nuey is now restrained of his liberty as more particularly appears in the aforesaid petition and for the said

reason is unable to make said application personally; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated upon information and belief and as to those matters he believes it to be true.

LEE SHARE DEW.

Subscribed and sworn to before me this 21st day of October, 1930.

[Seal] RUSSELL P. TYLER,
Court Commissioner, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 23, 1930. [9]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Upon reading the petition for a writ of habeas corpus on file in the above-entitled action, and good cause appearing therefor,—

IT IS HEREBY ORDERED that John D. Nagle, Esq., Commissioner of Immigration at the Port of San Francisco be, and appear on the 10th day of November, 1930, at the hour of ten o'clock A. M. thereof, at the courtroom of the said court, situate on the third floor of the United States Post Office Building, corner of Seventh and Mission Streets in the City and County of San Francisco, State of California, to show cause, if any there be, why a writ

of habeas corpus should not issue as prayed for herein.

AND IT IS FURTHER ORDERED that pending the determination of this matter that the custody of the said Lee Get Nuey, the detained person, on whose behalf a writ of habeas corpus is made herein, shall not change, and that the said detained person shall not be removed from the Northern District of the State of California and the jurisdiction of this Court until the further order of this Court. [10]

This order is expressly made binding upon the said John D. Nagle, Esq., Commissioner of Immigration, and all other immigration officers and agents acting as such, within the said Northern District of California.

Dated October 23d, 1930.

HAROLD LOUDERBACK,
Judge.

[Endorsed]: Filed October 23, 1930. [11]

[Title of Court and Cause.]

APPEARANCE OF RESPONDENT.

Respondent hereby appears through the undersigned attorney and files herewith in answer to the order to show cause herein, the original certified record of the immigration proceedings relative to

Lee Get Nuey before the Bureau of Immigration and the Secretary of Labor.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Respondent.

[Endorsed]: Filed March 9, 1931. [12]

[Title of Court and Cause.]

AMENDMENT TO PETITION.

Now comes Lee Share Dew, the petitioner in the above-entitled proceeding for a writ of habeas corpus for and on behalf of his son Lee Get Nuey, and amends his said petition for a writ of habeas corpus by adding thereto the following attached exhibits, to wit:

1. The summary of the Special Board of Inquiry at the Port of San Francisco had in the proceeding of the said detained person at said port, which summary is attached hereto, marked Exhibit "A," and made a part hereof and expressly made a part of the said petition for the writ of habeas corpus as if set forth therein.

2. The summary of the Board of Review, Bureau of Immigration, Department of Labor, Washington, D. C., had in the proceeding of the said detained person on appeal from the decision of the Special Board of Inquiry at the Port of San Francisco, which summary is attached hereto, marked Exhibit "B," and made a part hereof and expressly made a

part of the said petition for the writ of habeas corpus as if set forth therein.

RUSSELL P. TYLER,
Attorney for Petitioner. [13]

EXHIBIT "A."

SUMMARY.

By CHAIRMAN:

This applicant, Lee Get Nuey, seeks admission as the natural son of Lee Share Dew, who was adjudged a native of this country in proceedings No. 5710 by the U. S. District Court, N. D. C., on October 4, 1888. The applicant is said to be 30 years old, Chinese reckoning, the date of his birth being given as KS. 27–10–29 (December 9, 1901). Thus according to the claims advanced, he is 28 years and 8 months of age, at the present time. The applicant appears to be a man at least 35 years old, American reckoning, but in view of the fact that he is and claims to be an adult, I believe it inadvisable to formally challenge him on the question of age. Lee Share Dew returned to China on what was said to be his second trip, on November 28, 1900, returning to this country on January 27, 1902, his presence in China at the essential time to render paternity of a child born December 9, 1901, is thus established. Upon his return he was not questioned as to his marital status. It appears Lee Share Dew did not again come to the attention of this Service until August 12, 1924, at which time he appeared at this Station as an applicant for Form 430. He then stated that he had been married once

in China, that his wife Fong Shee, was then living in the Gock Suey Village S. N. D., China, and that he had one child, a son, for whom he then gave the same name and birth date as are now given for the present applicant. Lee Share Dew sailed from this port on September 2, 1924, and returned on December 16, 1925. Upon his return, he claimed his wife was still living, and that she had borne him another son, Lee Wah Foon, on August 23, 1925. He again claimed a son as the result of the previous trip mentioned, but gave for his son the name Lee Nuey Gat, and the birth date as KS. 28–10–29 (November 28, 1902). He has not since appeared before this Service until the present time.

The evidence submitted in this case consists of the testimony of the alleged father, the applicant, and an identifying witness, Lee Lin Sing, who, it is claimed, has knowledge of the relationship alleged to exist in this case, by reason of his making the acquaintance of the applicant and certain other members of the latter's family during a recent visit to China. While the statements of the witnesses do not contain a large number of serious disagreements, there developed a few discrepancies and inconsistencies of such a very material nature as to raise in the minds of the Board very serious doubts as to the existence of the relationship claimed, and as to leave no question concerning the falsity of at least a large portion of the testimony. This refers only to the statements of the two principals, the testimony, so far as it concerns the identifying witness, being in good agreement. Numerous features lead me to believe that the evidence in this

case is largely, if not completely manufactured expressly for use in the hearing before this service.

The applicant states that he has been married once, in CR. 8–10–15 (December 6, 1919), and there have been born to him and his wife three children a son Lee Lin Fat, born July 15, 1923, still living in China, a second son, Lee Tin Jin, born about the middle of the year 1924, who died in the 12th month of the same Chinese year, CR. 13 (January, 1925), and a daughter Lee Gew, born June 12, 1926, still living. He claims, (pg. 19) he cannot [14] remember the birth date of his 2nd son because he wishes to forget about him, but states that this child was born about the 6th month of CR. 13 (July 2 to 31, 1924). Testifying at this Station Aug. 12, 1924, at a time when he had not been in China for over 22 years, the alleged father, in reply to the question "Q. Is your son married?" stated "yes, to Wong Shee, CR. 7 (1918) 2 sons, 1 daughter." Note that this was nearly two years prior to the date now given for the birth of the applicant's only daughter. In the present case alleged father testified (pg. 5) the applicant has never had more than 2 children, a son, Lee Lin Fat, born in 1923 and a daughter Lee Gew, born in 1926. He also now agrees with the applicant regarding the time of the latter's marriage CR. 8–10–15 (Dec. 6, 1919). When confronted with his 1924 testimony that his son then had 3 children, 2 sons and 1 daughter, he is unable to give any explanations. Applicant testified that his father was at home in China at the time his 2nd son Lee Lin Jin, died, and that this child died in

the same house in which his father was then living. In this connection there should also be noted the testimony of both principals (pgs. 12 and 26) regarding the number of children the applicant had at the time the alleged father was last in China. Both first state that applicant had two children, a son and a daughter, at the time in question, the alleged father failing to note the contradiction until he started to describe the daughter.

There are many indications that the testimony regarding the Gock Suey Village, where the applicant is said to have lived all of his life, is fabricated. This village is said to contain 5 dwelling houses, 1 social hall and 5 toilet houses. Of the 4 families besides their own said to live in the village, two have no children whatever while the other two each have one son only. Both of the latter are described as being about the same age as the applicant, one still single, and the other, while married for several years, has never had any children. The principals are in disagreement concerning many details in their descriptions of the home village.

Alleged father testifies (pg. 9) the 5 toilets all touch one another and so indicates on his diagram (Exhibit "A"). The applicant states (pg. 23) there are spaces between each of the 5 toilets large enough for a person to pass through and he indicates on his diagram of the village (Exhibit "B") that each of the toilets is separated from the others by a small space.

Alleged father testified (pgs. 9 and 31) there are hedges of trees surrounding the village on both sides

and the back, with a bamboo hedge at the front. Applicant testifies (pg. 24) there is a bamboo hedge across the front of the village and some bamboos and trees mixed on the west side or tail, but no barriers of any kind on the back or on the east side.

The principals agree there is a gate on each side of their village which both state are enclosed by inserting upright wooden poles. Alleged father testified (pg. 10) there were no stone slabs beneath the gateways, the poles being held, at the bottom by means of heavy wooden beams. Applicant states (pg. 24) there have been slabs of stone beneath both gates as far back as he can remember, and that the poles are held in place at the bottom by being inserted in hole in these stones.

It is agreed there is but one well in the village. Alleged father testifies this well is located in front of the village at the [15] head and that the location of this well is indicated on his diagram of the village with approximate correctness. The applicant indicates on this diagram (Exhibit B) that the only well in his village is located at the east end or head of the village, slightly to the back of the east and west line of the houses. He testifies (pg. 24) that the well is neither toward the front or back of the village, but is just about in line with the houses. He states this is the only well that has ever been in his village to his knowledge.

The principals agree that Lee Share Dew's father is burried in the Ngow Hill, his mother at the Bong Hom Hill and his paternal grandparents in the Jee Yon Hill. Both claim to have visited these three

graves while the alleged father was last in China. The latter testified (pgs. 7, 8, and 31) that the Ngow Hill is located about 2 lis north, the Bong Hom Hill about 1 li west and the Jee Yon Hill about 1 li east of their village. The applicant testifies that the Ngow Hill is about 2 lis west, the Bong Hom Hill about 1 li west and the Jee Yon Hill about half of a li west of his village, and is positive in his statement that all three of these hills lie in the same direction from the village.

The alleged father testifies (pgs. 10 and 31) that *one* one neighboring village can be seen from Gock Suey Village. This, the Doo Nai Hong Village, he states is located a little over 1 li in front or to the north of his village. The applicant testified that the Doo Nai Hong Village is about half a li east of his village and that another village, occupied by Woo Family people, and situated about 3 lis to the south, can also be seen from his village. The alleged father, while he states there are 7 or 8 houses occupied by the Woo Family at the rear of his village, states these houses cannot be seen from his village.

The alleged father states the open court of his house has a brick floor while the applicant testifies the open court of his father's house has a tile floor. To be certain there was no misunderstanding concerning this feature both were asked to explain their conception of brick and tile and both make the same distinction. The alleged father testified (pg. 11) that there is a skylight in each kitchen of his house, both of which are covered with tiles. The applicant testifies (pg. 25) that the skylights in the kitchens of

his house are covered with boards, that he is certain these covers are made of wooden boards.

Alleged father states (pgs. 9 and 31) that the schoolhouse or social hall in his village contains 3 rooms, a bedroom, a kitchen and a parlor and that the bedroom and kitchen are both separated from the parlor by partitions. The applicant testified (pg. 24) the schoolhouse contains but 2 rooms, a parlor and a small room on the west side. He states there is no kitchen in this building, there being only a small portable stove kept in one corner of the parlor for cooking purposes.

The alleged father testifies (pg. 13) that when he was last in China he told applicant to go to the Fook Chong store in Som Gop Market to inquire for work. It is claimed that the applicant has been working at that store for the past four years. The applicant testifies that his father never suggested to him that he should go to work, that his father never told him he might find employment at the Fook Chong Store and that his father had no hand in his obtaining a position. [16]

Alleged father states while he was last in China he had his hair cut by barbers who came to his village. The applicant testified that his father had his hair cut at the Som Gop Market and that barbers never visited his village.

Alleged father testifies that Lee Ming Yin's widow shaved the head of his son Lee Wah Foon in the parlor of his house and that the applicant was present on that occasion (pg. 12). The applicant testifies (pg. 2) that the same woman shaved Lee

Wah Foon's head in the west side bedroom of their house, this being the only time that his head was shaved.

Alleged father testifies that he has received 2 letters written to him by the applicant, one acknowledging receipt of the affidavit and the other notifying him of the applicant's sailing from China. The applicant testifies that the only letter he ever wrote to this father was one he sent from Hongkong informing him that he was leaving for the U. S.

Alleged father testifies (pg. 15) that when he was last at home the applicant requested him to bring him to the U. S. and that he informed the applicant he would have to let the matter rest until he returned to this country. The applicant testified (pg. 28) that he has never requested his father to bring him to this country, that he has never at any time discussed with his father the subject of his coming to the U. S., nor had his father ever mentioned this subject to him.

The alleged father gives his mother's name as Ho Shee. The applicant states his paternal grandmother was named Hung Shee.

Because of the features noted, it is my opinion that the evidence submitted and adduced fails to satisfactory establish that the applicant is the natural son of Lee Share Dew, as claimed. No evidence has been submitted to indicate that the applicant is entitled to admission under other status than as the son of the native Lee Share Dew and I therefore move that he be denied admission to the U. S. on the ground that he is an alien who is with-

out status entitling him to such admission and on the further ground that the burden of proof has not been sustained as required by Sec. 23 of the Immigration Act of 1924.

By Member McNAMARRA.—I second the motion.

By Member OLIVER.—I concur. [17]

EXHIBIT "B."

In re: Lee Get Nuey; Age 28.

This case comes before the Board of Review on appeal from a decision of a Board of Special Inquiry denying admission as the son of a native citizen of the United States. The citizenship of the alleged father being conceded, the question at issue is relationship.

Attorney C. E. BOOTH has filed a brief.

Attorney C. A. TRUMBLY at the port.

While the record shows that the alleged father was in China at a time to make the claimed relationship possible, he does not appear to have been questioned about his family prior to 1924 when he claimed a son "Gick Nuey" born in 1901. In 1925 he named his oldest son "Nuey Cat" and said that he was born in 1902. The applicant is now called "Get Nuey" and said to have been born in 1901. The record affords no explanation of such inconsistency in the alleged father's description of the son who this applicant claims to be.

The alleged father was last in China in 1925 and an alleged acquaintance who claims to have met the

applicant in China in 1928 appeared to testify. The testimony shows such discrepancies as the following:

While the alleged father describes and in a diagram indicates the village toilet houses are contiguous, the applicant describes and diagrams these structures as separated by a space wide enough for a person to pass between. Whereas the alleged father says the bases of the gateways consist of wooden beams, the applicant says that they have always consisted of stone slabs. While the alleged father places the village well at the front of the village, the applicant locates it midway between the front and the back. Whereas the alleges father testifies that when he was last at home he told the applicant to look for work at the store where the applicant is said to have been later employed and that being asked by the applicant to bring him to the United States they discussed the matter at that time, the applicant declares that he was not told by his father to look for work at the said store and that the matter of his coming to the United States was not mentioned when his father was last at home. While the alleged father says that when he was last at home he had his hair cut by barbers who came to his village, the applicant says that barbers never came to his village and that his father when last in China had his hair cut in the Som Gop market.

However the outstanding adverse feature of this case is not in the present testimonial discrepancies which alone might not be sufficiently serious to compel an excluding decision. The outstanding feature is the fact that on August 12, 1924, at a time when, according to the present testimony of the applicant,

he had only one son of whose birth his alleged father could have been advised, the alleged father stated under oath at San Francisco that his son who this applicant claims to be had two sons and one daughter. The applicant testifies that his second son was not born until just about the time that his alleged father made the said statement and that his daughter was not born until 1926, two years later. The attorney, attempting to maintain a theory that the 1924 statement may have been erroneously set down, says that it was taken without the aid of a Chinese interpreter. But the statement not only bears the signature of the alleged father but also that of the Chinese interpreter who [18] officiated at its taking. The alleged father merely says that he cannot remember making such a statement and "If I did, that was incorrect." In view of the fact that in August, 1924, the Chin Bow decision not having yet been rendered, the impression was abroad that children of a native's son who had not yet established residence in the United States were eligible for admission as citizens, there was a motive for the alleged father's making the fraudulent claim that his son who had not yet come to the United States had a family in China. The record shows that in claiming that his alleged son had three children two years before one of them was born (according to the present testimony) the alleged father did make such a fraudulent claim. Moreover, while the applicant now testifies that he had two sons, one of whom died while his father was at home in China, the alleged father now says that his son whom applicant claims to be never had more than one son.

Considering this record which at least utterly discredits the alleged father, as well as the discrepancies in the present testimony, together with the inconsistencies in the alleged father's mentioning of his son who the applicant claims to be, and finding no slightest ground for the attorney's claim that the resemblance between the applicant and his alleged father, the Board of Review is compelled to conclude that this applicant's claim has not by the evidence been reasonably established.

It is therefore recommended that the appeal be dismissed.

[Endorsed]: Receipt of a copy of the within acknowledged this 20th day of March, 1931.

GEO. J. HATFIELD,
U. S. Attorney.

Filed March 20, 1931. [19]

[Title of Court and Cause.]

ORDER DENYING PETITION FOR WRIT, ETC.

This matter having been heard on the application for a writ of habeas corpus (by order to show cause), and having been argued and submitted,—

IT IS ORDERED, after a full consideration, that the application for a writ of habeas corpus be, and the same is hereby DENIED; that the petition be, and the same is hereby DISMISSED; that the order to show cause be, and the same is hereby DISCHARGED; and that the applicant be deported by

the United States Immigration Authorities at San Francisco, California.

Dated: May 25, 1931.

A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed May 25, 1931. [20]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the Above-entitled Court, to JOHN D. NAGLE, Commissioner of Immigration, and to GEORGE J. HATFIELD, Esq., United States Attorney, His Attorney:

You and each of you will please take notice that Lee Get Nuey, the person in whose behalf the petition was filed in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals, for the Ninth Circuit, from the order and judgment rendered, made and entered on the 25th day of May, 1931, denying the amended petition for a writ of habeas corpus filed herein.

RUSSELL P. TYLER,
Attorney for Appellant.

[Endorsed]: Receipt of a copy of the within acknowledged this 26th day of May, 1931.

GEO. J. HATFIELD,
U. S. Attorney.

Filed May 26, 1931. [21]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Now comes Lee Get Nuey, the person in whose behalf the amended petition for a writ of habeas corpus was filed in the above-entitled matter, and respectfully shows:

That on the 25th day of May, 1931, the above-entitled court made and entered its order denying the amended petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, the appellant prays that an appeal be granted in his behalf to the Circuit Court of Appeals for the United States, for the Ninth Circuit thereof, for the correction of errors as complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled court, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals, for the Ninth Circuit thereof, and further, that said appellant be held within the jurisdiction of this court during the pendency of the [22] appeal herein, so that he may be produced in execution of whatever judgment may be finally entered herein.

Dated, San Francisco, California, this 26 day of May, 1931.

RUSSELL P. TYLER,
Attorney for Appellant.

[Endorsed]: Receipt of a copy of the within acknowledged this 26th day of May, 1931.

GEO. J. HATFIELD,
U. S. Attorney.

Filed May 26, 1931. [23]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes Lee Get Nuey, the person in whose behalf said amended petition for a writ of habeas corpus was filed in the above-entitled proceeding through his attorney, Russell P. Tyler, Esq., and sets forth the errors he claims the above-entitled court committed in denying his amended petition for a writ of habeas corpus, as follows:

I.

That said Court erred in not granting the writ of habeas corpus and discharging the said detained Lee Get Nuey from the custody and control of John D. Nagle, Commissioner of Immigration at the Port of San Francisco.

II.

That the Court erred in not holding that it had jurisdiction to issue the writ of habeas corpus in the above-entitled cause, as prayed for in the

amended petition on file herein on behalf of the said Lee Get Nuey for a writ of habeas corpus.

III.

That the Court erred in not holding that the allegations [24] set forth in the petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus.

IV.

That the Court erred in not holding that the said Lee Get Nuey was or is unlawfully imprisoned, detained, confined and restrained of his liberty by the said John D. Nagle, Commissioner of Immigration at the Port of San Francisco.

V.

That the Court erred in not holding that there was an abuse of discretion on the part of the immigration officials in denying the said Lee Get Nuey the right to enter the United States as the lawful legitimate son of Lee Share Dew, a recognized and admitted citizen of the United States of America.

VI.

That the Court erred in not holding that it was an abuse of discretion on the part of the immigration officials in denying the said Lee Get Nuey the right to enter the United States as the recognized and accepted son of Lee Share Dew, a recognized and admitted citizen of the United States of America.

VII.

That the Court erred in not holding that the evidence produced at the trial *de novo* granted in the

above-entitled proceeding was sufficient to establish that the said detained Lee Get Nuey was a citizen of the United States of America as the lawful legitimate son of Lee Get Nuey, an admitted and recognized citizen of the United States of America.

VIII.

That the Court erred in holding that the evidence produced at the trial *de novo* granted in the above-entitled proceeding was not sufficient to establish that said detained Lee Get Nuey was a citizen of the United States of America as the recognized [25] and accepted son of Lee Share Dew, an admitted and recognized citizen of the United States of America.

IX.

That the Court erred in not holding that the evidence produced at the said trial *de novo* was sufficient in law to justify the granting and issuing of a writ of habeas corpus.

X.

That the Court erred in not holding that the hearing or hearings accorded to the said Lee Get Nuey by the said immigration officials was or were unfair.

XI.

That the Court erred in not holding that the evidence produced on behalf of the said Lee Get Nuey at the said trial *de novo* was sufficient upon which to predicate the issuance of a writ of habeas corpus.

WHEREFORE, appellant prays that said order and judgment of the United States District Court for the Northern District of California, made, given

and entered therein in the office of the Clerk of said court on the 25th day of May, 1931, denying the petition for a writ of habeas corpus be reversed and that the said Lee Get Nuey be restored to his liberty and go hence without delay.

RUSSELL P. TYLER,
Attorney for Appellant.

[Endorsed]: Receipt of a copy of the within acknowledged this 26th day of May, 1931.

GEO. J. HATFIELD,
U. S. Attorney.

Filed May 26, 1931. [26]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

It appearing to the above-entitled court that Lee Get Nuey, the person in whose behalf the amended petition herein was filed, has this day filed and presented to the above-entitled court his petition praying for an order of this Court allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and order of said Court denying a writ of habeas corpus and dismissing his amended petition for said writ, and good cause appearing therefor,—

IT IS HEREBY ORDERED that an appeal be and the same is hereby allowed as prayed for herein; and

IT IS HEREBY FURTHER ORDERED that the Clerk of the above-entitled court make and prepare a transcript of all papers, proceedings and records in the above-entitled matter and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit, within the time allowed by law; and

IT IS HEREBY FURTHER ORDERED that execution of the warrant of deportation of said Lee Get Nuey be and the same is hereby stayed pending this appeal and that the said Lee Get Nuey [27] be not removed from the jurisdiction of this court pending this appeal and that his present custody and control remain undisturbed pending this appeal.

Dated, San Francisco, California, this 26 day of May, 1931.

A. F. ST. SURE,
Judge of the District Court.

[Endorsed]: Receipt of a copy of the within acknowledged this 26th day of May, 1931.

GEO. J. HATFIELD,
U. S. Attorney.

Filed May 26, 1931. [28]

[Title of Court and Cause.]

ORDER RESPECTING WITHDRAWAL OF IMMIGRATION RECORD.

Upon reading the order allowing the appeal on file in the above-entitled matter and upon motion of

Russell P. Tyler, Esq., attorney for the appellant, and good cause appearing therefor,—

IT IS HEREBY ORDERED that the immigration record on file in the above-entitled matter and all exhibits introduced into the evidence during the trial *de novo* of said matter before the above-entitled court be withdrawn from the office of the Clerk of this court and transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and there to be considered as part and parcel of the record on appeal. Said withdrawal and transmittal to be made at the time the record on appeal is certified to the United States Circuit Court for the Ninth Circuit, by the Clerk of this court.

Dated, San Francisco, California, this 26th day of May, 1931.

A. F. ST. SURE,
United States District Judge. [29]

[Endorsed]: Receipt of a copy of the within acknowledged this 26th day of May, 1931.

GEO. J. HATFIELD,
U. S. Attorney.

Filed May 26, 1931. [30]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please issue:

1. Petition for writ of habeas corpus.

2. Order to show cause.
3. Appearance of respondent.
4. Amendment to petition.
5. Order denying application, ordering detained deported, etc.
6. Assignment of errors.
7. Order allowing appeal.
8. Order respecting withdrawal of immigration record.
9. Notice of appeal.
10. Citation on appeal.
11. Petition for appeal.
12. Praecipe.

RUSSELL P. TYLER,
Attorney for Applicant.

[Endorsed]: Filed Jul. 21, 1931. [31]

[Title of Court.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 31 pages, numbered from 1 to 31, inclusive, contain a full, true, and correct transcript of the records and proceedings in the Matter of Lee Get Nuey, on Habeas Corpus, No. 20,397–S., as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on ap-

peal is the sum of Ten Dollars and Seventy-five Cents ($10.75), and that the said amount has been paid to me by the attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of July, A. D. 1931.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [32]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America to JOHN D. NAGLE, Commissioner of Immigration at the Port of San Francisco, and GEORGE J. HATFIELD, Esq., United States Attorney, GREETING:

YOU AND EACH OF YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal of record in the Clerk's office of the United States District Court, for the Northern District of California, wherein Lee Get Nuey is appellant and you are appellee, to show cause, if any there be, why the decree rendered

against the said appellant as in the said order allowing the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. A. F. ST. SURE, United States District Judge of the Southern Division of the Northern District of California, this 26th day of May, 1931.

A. F. ST. SURE,
United States District Judge. [33]

Receipt of a copy of the within acknowledged this 26th day of May, 1931.

GEO. J. HATFIELD,
U. S. Attorney.

[Endorsed]: Filed May 26, 1931, 2:22 P. M. [34]

[Endorsed]: No. 6536. United States Circuit Court of Appeals for the Ninth Circuit. Lee Get Nuey, Appellant, vs. John D. Nagle, Commissioner of Immigration for the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 24, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Charles J. Barry,
Deputy Clerk.

No. 6536

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE GET NUEY,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLANT.

RUSSELL P. TYLER,
Kohl Building, San Francisco,
Attorney for Appellant.

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Subject Index

Page

If discrepancies form the basis of an excluding decision, the same must be sufficient to satisfy reasonable minds that the decision is justified 11

If the detained person be not accorded a fair hearing before the immigration authorities, he is entitled to be discharged on habeas corpus 19

Conclusion 20

Table of Authorities Cited

Pages

Chan Thet Poy, Ex parte, 13 Fed. (2d) 262, D. C. of Mass. 18
Chin Gum Wing v. Johnson, 13 Fed. (2d) 124, C. C. A. 1st 18

Fong Tam Jew v. Tillinghast, 24 Fed. (2d) 632, C. C. A. 1st 17

Geigow v. Uhl, 239 U. S. 3, 9, 35 Sup. Ct. 661, 59 L. Ed. 1493 19
Go Lun v. Nagle, 22 Fed. (2d) 246, C. C. A. 9th 12

Jew Yet Chew, Ex parte, 25 Fed. (2d) 886, D. C. of Mass. 17
Johnson v. Damon, C. C. A. 1st, 16 Fed. (2d) 65.....13, 17
Johnson v. Ng Ling Fong, C. C. A. 1st Circuit, 17 Fed. (2d) 11 .....17, 18

Kwock Jan Fat v. White, 253 U. S. 454, 458, 40 Sup. Ct. 566, 64 L. Ed. 1010 19

Lew Sun Soon v. Tillinghast, 27 Fed. 775 .....15, 16
Lewis v. Frick, 233 U. S. 291, 300, 34 Sup. Ct. 488, 58 L. Ed. 967 19
Low Wah Suey v. Backus, 225 U. S. 460, 468, 32 Sup. Ct. 734, 56 L. Ed. 1165 19

Mason ex rel. v. Tillinghast, 27 Fed. 580 15

Ng Yuk Ming v. Tillinghast, 28 Fed. (2d) 547 16
Nagle v. Dong Ming, 26 Fed. (2d) 438, C. C. A. 9th 17
Nagle v. Wong Ngook Hong, et al., 27 Fed. (2d) 650, C. C. A. 9th 14, 18

U. S. ex rel. Leong Ding v. Brough, C. C. A. 2d, December 5, 1927, 22 Fed. (2d) 926, at page 927 11

Wong Tsick Wye v. Nagle, 33 Fed. (2d) 226 17

Zakonaite v. Wolf, 226 U. S. 272, 274, 33 Sup. Ct. 51, 57 L. Ed. 218 19

No. 6536

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE GET NUEY,

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

This is an appeal from an order and judgment of the District Court of the United States, in and for the Northern District of California, Southern Division, dismissing appellant's petition for a writ of habeas corpus and denying to appellant any relief in connection therewith.

The citizenship of the father of the detained person is admitted and the only question to be considered is whether or no the detained person is the lawful natural son of his alleged father.

In view of the frivolousness of the contention that there are material discrepancies and inconsistencies presented by the immigration record, we believe that we should discuss first the facts applicable to this

proceeding before referring to the various cases establishing the law as to the rights of the appellant who is hereinafter referred to as the detained person.

The petition was amended by setting forth in full as "Exhibit A" and "Exhibit B," being the summary of the proceedings had before the Board of Special Inquiry at the Port of San Francisco, and the summary of the proceedings on appeal had before the Board of Review, Bureau of Immigration, Department of Labor at Washington, D. C., respectively.

In the summary of the proceedings had before the Special Board of Inquiry at the Port of San Francisco the decision denying the detained person the right to enter the United States is based and predicated upon the following discrepancies and inconsistencies:

It is first contended that there are many indications that the testimony regarding the Gock Suey Village, where the detained person is said to have lived all of his life, is fabricated. This is indeed a most unjustified statement to make in view of the fact that the alleged father and the detained person were requested, in the absence of each other, to draw on a sheet of paper a diagram representing the location of the various houses situated in the said village. An inspection of these diagrams shows that they are practically identical, both with reference to the number of houses, the number of toilets, the location of the houses, the location of the toilets, the general direction that the various houses faced and the identity of the house of the detained person and his said alleged father. These diagrams are contained in the Immi-

gration Record on file with this Court and a mere casual inspection of the same will certainly establish the absurdity of any such contention.

It is next contended that while the alleged father and the detained person both drew five toilets in practically the same location on the diagrams representing their home village, the father has the toilets contiguous and the detained person has them slightly separated. Such a contention as this is so obviously without merit that we believe it requires no further comment.

It is also contended that the alleged father testified that there are hedges of trees surrounding the village on both sides and the back, with a bamboo hedge at the front, and the detained person testified that there is a bamboo hedge across the front of the village and some bamboos and trees mixed on the west side or tail, but no barriers of any kind on the back or on the east side. Obviously a hedge is not a barrier and for all that appears to the contrary in the testimony of the alleged father the hedge might not have been sufficiently dense to constitute a barrier. Moreover it is not claimed that the detained person testified that there was a total absence of trees or shrubbery in the back of the village. There certainly is no inconsistency concerning the testimony of either the detained person or the alleged father in this respect, as neither was thoroughly interrogated as to whether or no there were any bamboos or other shrubbery in back of the village.

The next contention is that while the alleged father and the detained person both testified in substantial

accord as to a gate on either side of their village and that the same was enclosed by inserting upright poles, it is contended that the alleged father testified that there were no stone slabs beneath the gateways, the poles being held at the bottom by means of heavy wooden beams, and that the detained person testified that there were slabs of stone beneath both gates and that the poles were held at the bottom by being inserted in these stones. It is very easy to visualize the two gates surrounding a village of this character —they would probably be covered with dirt, weeds and other shrubbery. In the absence of a close examination as to what constituted the footing of these gates it would be impossible for anybody to intelligently answer questions as to the kind of material of which they were constructed. Undoubtedly there probably was some wood used in the footing and there may have been stone, but regardless of what the footings were constructed of there is nothing in the testimony to show that either the alleged father or the detained person ever paid any particular attention to the construction of either of these gates. Frankly the writer of this brief would be unable offhand to state definitely whether the foundation of the front stairs of his residence is composed of brick, concrete or other materials. The importance of the questions, if any, has to do with whether or no there were gates to the village. Both the alleged father and the detained person testified in substantial accord as to the general location and construction of these gates, the methods used to close the gates and the only variance, if any, is on the question as to what the footing, which as has

already been suggested was probably covered with dirt and overgrown vegetation, is composed of. We believe that such a contention as this is of itself proof of the weakness of the position of the immigration authorities in seeking to exclude the detained person.

It is next contended that while both the alleged father and the detained person alleged that there was only one well in the village the alleged father testified that the well is located in front of the village, while the detained person says that the well is neither towards the front nor the back of the village, but is in line with the houses. It must be conceded that both the alleged father and the detained person are in substantial accord as to there only being one well in the village and as to the general location of this well. Whether the well is four or five feet removed from the line of houses is a mere matter of recollection and as such constitutes a matter that both the alleged father and the detained person could be honestly mistaken concerning. Moreover the term "front" as used by the alleged father is a relative term and might well describe any territory to the north of the village.

The next contention is that while the alleged father and the detained person agree that Lee Share Dew's father is buried in the Ngow Hill, his mother in the Bong Hom Hill and his paternal grandparents in Jee Yon Hill, they differ slightly with respect to the location of these various cemeteries from their home village. Direction, of course, is always relative and the main thing to be considered is that they are

absolutely in substantial accord as to the names of the various cemeteries and as to the names of the deceased persons buried in these cemeteries.

It is further contended that the alleged father testified that one neighboring village can be seen from his home village, giving the name of this neighboring village as Doo Nai Hong Village, which, he states, is a little over 1 li to the front or north of his home village. The detained person testified as to the location and distance of this same neighboring village and of being able to see another neighboring village occupied by Woo Family people situated about 3 lis to the south of his home village. The alleged father stated that the village occupied by the Woo Family could not be seen from his home village. Taking into consideration that it is admitted that the village occupied by the Woo Family is three times as far from the home village of the detained person and his alleged father as the Doo Nai Hong Village both testified to as being able to be seen from the home village, the answer to this alleged discrepancy and inconsistency is apparent—the alleged father being an older man is probably unable to see as far as the detained person, who, of necessity, is a considerably younger man.

It is next contended that there is a serious discrepancy between the testimony of the alleged father and the detained person in this, that while both the alleged father and detained person testified in substantial accord as to the location of an open court of the alleged father's house, the alleged father testified that the court had a brick floor, while the de-

tained person testified that the court had a tile floor. We are wondering whether the immigration authorities are familiar with Chinese bricks. We feel that in view of the statement contained in the summary that they are not. A Chinese brick is of course not of the same materials or dimensions of the common American brick. Bricks are made in China by a baking process and are of different sizes, dimensions and character. Tiles, of course, are made in like manner and as a matter of fact there is no difference between a tile and a brick. Moreover it is impossible to translate from the Cantonese dialect of the Chinese language into the English language any distinction between articles so closely allied.

It is claimed that there is a discrepancy between the testimony of the alleged father and the detained person with regard to the school house or social hall in the village. The alleged father testified that this structure contained three rooms, a bedroom, a kitchen and a parlor, and the detained person testified that it contained two rooms, a parlor and a small bedroom on the west side, but that there was a stove located in the parlor. Undoubtedly the parlor is so constructed that a portion of it can be utilized for cooking and, therefore, in the opinion of the alleged father, constituted two rooms instead of one. The main point of inquiry regarding this school house should be its location with reference to the other buildings situated in the village and in this both the detained person and his alleged father are in substantial agreement.

Another contention is made that the detained person and the alleged father are in disagreement in their testimony in that the alleged father testified that he advised the detained person to look for work at the Fook Chong Store, whereas the detained person testified that he procured this employment without suggestion from his alleged father. Taking into consideration that the detained person worked at the store in question for some four years prior to his arrival in this country, it seems rather immaterial as to whether he and his alleged father had previously discussed the advisability of his applying for a position in that establishment. The main thing is that both agree that he worked in that store.

While the alleged father was in China it is claimed that he had a hair cut. The alleged father testified that some roaming barbers who visited his village cut his hair, while the detained person testified that his father had his hair cut at the Som Gop Market. Taking into consideration the length of the alleged father's stay in China, it certainly is not improbable to assume that he had his hair cut on several occasions. It may have been that the detained person was absent from the home village at the time his father had his hair cut by the so-called roaming barbers.

It was also contended that the alleged father testified that a boy by the name of Lee Wah Foon had his head shaved in the parlor of his house by the widow of Lee Ming Yin. The detained person testified that he saw the widow of Lee Ming Yin shave the head of

Lee Wah Foon, but he believed that it was done in the west side bedroom of their house. This is an example of how trifling the alleged discrepancies and inconsistencies are.

It is respectfully submitted that taking into consideration that the alleged father and the detained person were separately examined in the absence of each other by the immigration officials that it would have been absolutely impossible for them to have prepared answers to the questions that were given, for they couldn't possibly have anticipated the question being asked. How could either anticipate the asking of the question concerning the widow of Lee Ming Yin shaving the head of Lee Wah Foon? The same is true of the question as to the detained person being employed in the Fook Chong store in China. Likewise as to the location of the school house and the relative position of the buildings situated in the home village, also as to the construction and locality of the gates and in fact all other matters as to which each was interrogated.

From reading the summary alone, without reference to the testimony, it at once becomes obvious and apparent that the detained person and his alleged father are in substantial agreement concerning all matters. In fact so apparent was this fact that the Reviewing Board in Washington, D. C., in commenting upon the alleged discrepancies and inconsistencies state:

> "However, the outstanding adverse feature of this case is not in the present testimonial dis-

crepancies which alone might not be sufficiently serious to compel an excluding decision."

The Reviewing Board at Washington, D. C., predicated the order excluding the detained person from admission into the United States on testimony that was given on or about August 12, 1924, by the alleged father to the effect that the detained person had two sons and one daughter. Admittedly he had two sons but did not have a daughter. This, however, was a question that the alleged father was testifying to from mere hearsay, as it will be remembered that prior to the time of giving this testimony in 1924 the alleged father had resided in this country continuously from January the 27th, 1902, a period of approximately twenty-two and a half years, without returning to China. He had never seen the detained person during this period of time and of necessity the family relations of the detained person with reference to the number of children that the detained person might have had was merely hearsay as far as the alleged father's personal knowledge was concerned. There is very serious doubt as to whether he ever made any such statement, because when he was interrogated in the instant proceeding he very frankly told the immigration authorities that he did not remember making such a statement and if he had done so that it was incorrect. There certainly could be no reason that would actuate the alleged father in giving any such testimony. Moreover the testimony is not material in that it does not affect the claimed relationship between the alleged father and the detained person, which is the only fact in dispute. Obviously the al-

leged father had no personal knowledge as to the number of the detained person's children.

It will be noticed that the record establishes without conflict that the detained person and the alleged father are in substantial agreement and accord concerning all matters that they testified to and that the record does not present any substantial discrepancies or inconsistencies sufficient upon which to base or predicate an order excluding the detained person from admission into the United States.

IF DISCREPANCIES FORM THE BASIS OF AN EXCLUDING DECISION, THE SAME MUST BE SUFFICIENT TO SATISFY REASONABLE MINDS THAT THE DECISION IS JUSTIFIED.

The detained person was entitled to admission upon proving his claims to a reasonable certainty.

Discrepancies which do not in fact exist or which are the probable result of honest mistake rather than deliberate error, or which are trivial and unimportant, do not constitute evidence warranting denial of the existence of the claimed relationship. If so-called discrepancies form the basis of an adverse decision, the same must be sufficient to satisfy a reasonable mind in reaching the same conclusion.

In *U. S. ex rel. Leong Ding v. Brough,* C. C. A. 2d, December 5, 1927, 22 Fed. (2d) 926, at page 927, the Court said:

> "* * * In Zakonaite v. Wolf, 226 U. S. 272, 33 Sup. Ct. 31, 57 L. Ed. 218, the rule was applied that, if it appeared that there was some evidence, and sufficient to satisfy a reasonable

man, that the Chinese person claiming the rights of American citizenship was not entitled thereto, he must be excluded. But here the evidence does not warrant a reasonable mind holding that the appellant was other than he represented. The result below does not satisfy the requirement of a fair hearing. There is no substantial evidence to support the conclusion below. * * *"

In *Go Lun v. Nagle,* 22 Fed. (2d) 246, C. C. A. 9th, the Court, at page 247, said:

"* * * The examination of the father and prior landed brother covered pretty much the same ground. The three witnesses were in full accord as to their relationship, the history of the family, the home, and its surroundings, in all the infinite detail above set forth. There were some so-called discrepancies in the testimony, however, and because of these admission was denied, and the excluding decision was affirmed on appeal.

We may say at the outstart that discrepancies in testimony, even as to collateral and immaterial matters, may be such as to raise a doubt as to the credibility of the witnesses and warrant exclusion; but this cannot be said of every discrepancy that may arise. We do not all observe things, or recall them in the same manner, and an American citizen cannot be excluded, or denied the right of entry, because of immaterial and unimportant discrepancies in testimony covering a multitude of subjects. The purpose of the hearing is to inquire into the citizenship of the applicant, not to develop discrepancies which may support an order of exclusion, regardless of the question of citizenship.

* * * * * * *

We fully appreciate the narrow limits of the jurisdiction of the courts on habeas corpus proceedings to review decisions of the immigration tribunals; but 'the error of an administrative tribunal may, of course, be so flagrant as to convince a court that the hearing had was not a fair one.' Tisi v. Tod, 264 U. S. 131, 44 S. Ct. 260, 68 L. Ed. 590. Such a case is presented here.

A reading of the entire testimony of the three witnesses leaves not the slightest room for doubt that their relationship was fully established, and that the appellant is a citizen of the United States. A contrary conclusion is arbitrary and capricious, and without any support in the testimony.

In Johnson v. Damon (C. C. A.) 16 Fed. (2d) 65, the court considered discrepancies on which an exclusion decision was based, more important than any disclosed by the present record, and in reference to the excluding decision said: 'The mind revolts against such methods of dealing with vital human rights.' See also, Ex parte Chung Thet Poy (D. C. 13 Fed. (2d) 262, and Johnson v. Ng Ling Fong, supra."

In *Johnson v. Damon,* C. C. A. 1st, 16 Fed. (2d) 65, the Court said:

"This court has by repeated decisions shown its full appreciation of the very narrow limits of the jurisdiction of the courts on habeas corpus proceedings to review the decisions of the immigration tribunals. Cf. Johnson v. Kock Shing (C. C. A.) 3 F. (2d) 889; Ng Lung v. Johnson (C. C. A.) 8 F. (2d) 1020. In many cases this court has felt bound to sustain results grounded

upon a finding of deliberate perjury, when the evidence in support of so serious a proposition seemed inadequate, if weighed as courts and juries are expected to weigh such evidence. But there is a limit beyond which no fact-finding tribunal can go in finding a case made up out of whole cloth. This seems to us such a case.

It falls within the rule stated by Mr. Justice Brandeis in Tisi v. Tod, 264 U. S. 131, 133, 44 S. Ct. 260, 261 (68 L. Ed. 590):

'The error of an administrative tribunal may, of course, be so flagrant as to convince a court that the hearing had was not a fair one.'

The same controlling principle is recognized by this court in Goon Hen Soo v. Johnson (C. C. A.) 13 F. (2d) 82: 'While the discrepancies disclosed by the testimony of the witnesses relate to matters of a seemingly trivial nature, yet, we cannot say as a matter of law that they were not sufficient to justify reasonable minds in arriving at the conclusion reached by the Immigration Board.' Here is a recognition that the discrepancies must be 'sufficient to justify reasonable minds,' etc."

In the case of *Nagle v. Wong Ngook Hong, et al.*, 27 Fed. (2d) 650 (Ninth Circuit), the Court at page 651 of the opinion said:

"Certain discrepancies are relied upon by the Commissioner, but we agree with the lower court that they are either only apparent or insignificant. No group of witnesses, however intelligent, honest and disinterested, could submit to the interrogation to which these witnesses were subjected without developing some discrepancies."

In the case of *Mason ex rel. v. Tillinghast,* 27 Fed. 580, the Court at page 581 of the opinion said:

> "After reading and rereading the record in this case, we think that the immigration authorities acted arbitrarily and unfairly in reaching their decision. There is nothing in the record which would warrant a finding that this American citizen did not have a wife and three sons, as he and the two sons testify.
>
> The case falls under the principle laid down in Tisi v. Tod, 264 U. S. 131, 44 S. Ct. 260, 68 L. Ed. 590: 'The error of an administrative tribunal may, of course, be so flagrant as to convince a court that the hearing had was not a fair one.' It is, in effect ruled by our decisions in Fong Tam Jew v. Tillinghast, (C. C. A.) 24 F. (2d) 632; Johnson v. Ng Ling Fong (C. C. A.) 17 F. (2d) 11, 12; Johnson v. Damon (C. C. A.) 16 F. (2d) 65; Chan Sing v. Nagle (C. C. A.) 22 F. (2d) 673, 674; Cf. Kwock Jan Fat v. White, 253 U. S. 454, 464, 40 S. Ct. 566, 64 L. Ed. 1010; Chin Yow v. United States, 208 U. S. 8, 28 S. Ct. 201, 52 L. Ed. 369; Go Lun v. Nagle (C. C. A.) 22 F. (2d) 246; United States ex rel. Leong Ding v. Brough (C. C. A.) 22 F. (2d) 926; Whitefield v. Hanges (C. C. A.) 222 F. 745; In re Chung Thet Poy (S. C.) 13 F. (2d) 262."

Also *Lew Sun Soon v. Tillinghast,* 27 Fed. 775, where it was held that a finding of the immigration tribunal that the alien applying for admission as a son of a citizen was not entitled to admission, based on certain inconsistencies between certain statements of the applicant and those of his brother respecting collateral matters was unreasonable and arbitrary so

as to constitute a lack of a fair hearing. The inconsistencies before the Court consisted (1) the question of whether or no the school houses in the village were attached or detached, (2) with respect to the lighting and arrangement of the ancestral hall where both brothers attended school, and (3) the balconies on rooms in the family home.

Commenting on these discrepancies, the Court at page 776 of the opinion said:

> "Obviously these matters had no bearing on the real issue."

It is interesting to note that the discrepancies relied upon in the case of *Lew Sun Soon v. Tillinghast,* supra, are practically the same as those relied upon in the instant case.

In the case of *Ng Yuk Ming v. Tillinghast,* 28 Fed. (2d) 547, the citizenship of the father, like in the instant case, was conceded, but the relationship denied. In that case the applicant's testimony disagreed with the father in the following respect:

> (1) Whether the applicant slept in the school house or at the family home during the father's stay in China;
>
> (2) The description of the school house and the identity of a number of families of certain near neighbors;
>
> (3) The question of whether the father visited the applicant at the school and the description of the room while there;
>
> (4) Whether they slept at school; and
>
> (5) The question as to whether a door keeper was maintained at the school or otherwise.

Obviously all of these discrepancies were much more important than those presented in the instant case, yet the Court in commenting upon the character of the alleged discrepancies held that the discrepancies relied upon by the immigration authorities relate to collateral matters, all of which are of such a trifling nature as to furnish no substantial evidence for reaching contrary conclusions as to the rights of the applicant.

Mr. Justice Rudkin in rendering a recent decision in this Court in the case of *Wong Tsick Wye v. Nagle,* 33 Fed. (2d) 226, had occasion to specifically point out a number of discrepancies which, in his opinion, would not constitute material inconsistencies that would justify a deportation. It will be noticed that none of the discrepancies presented in the instant case are as material on any question presented as those considered by Justice Rudkin and found by him to merely constitute collateral or trifling variances.

See, also:

Nagle v. Dong Ming, 26 Fed. (2d) 438, C. C. A. 9th;

Ex parte Jew Yet Chew, 25 Fed. (2d) 886, D. C. of Mass.;

Fong Tam Jew v. Tillinghast, 24 Fed. (2d) 632, C. C. A. 1st;

Johnson v. Ng Ling Fong, 17 Fed. (2d) 11, supra;

Johnson v. Damon, 16 Fed. (2d) 65, C. C. A. 1st;

Ex parte Chan Thet Poy, 13 Fed. (2d) 262, D. C. of Mass.;

Chin Gum Wing v. Johnson, 13 Fed. (2d) 124, C. C. A. 1st.

In *Johnson v. Ng. Ling Fong,* C. C. A. 1st Circuit, 17 Fed. (2d) 11, the Court said:

> "The records in the Immigration Department concerning the alleged father and his family since 1909 are so complete, and the statements as to the number and births of his children have been so consistent, through this long period of time, that it is inconceivable that fair-minded men, free from bias and suspicion, should entertain any reasonable doubt as to the relationship of the applicant and the alleged father. * * *"

In the case of *Nagle v. Wong Ngook Hong, et al.,* 27 Fed. (2d) 650, C. C. A. 9th, the applicants were excluded because the relationship was not established, based upon "8 major discrepancies." The applicants were discharged by the District Court and its decision affirmed by the Circuit Court of Appeals. The Court (C. C. A.) said:

> "Owing to the wide range of the examination of the several witnesses, repetition, and minute detail, the records are voluminous. Certain discrepancies are relied upon by the Commissioner, but we agree with the lower court that they are either only apparent or insignificant. No group of witnesses, however intelligent, honest, and disinterested, could submit to the interrogation to which these witnesses were subjected without developing some discrepancies."

IF THE DETAINED PERSON BE NOT ACCORDED A FAIR HEARING BEFORE THE IMMIGRATION AUTHORITIES, HE IS ENTITLED TO BE DISCHARGED ON HABEAS CORPUS.

It must be considered, as well settled, that if the decision of the immigration authorities has not been arbitrarily or unfairly reached, the Courts cannot go into the merits and set the decision aside.

Low Wah Suey v. Backus, 225 U. S. 460, 468, 32 Sup. Ct. 734, 56 L. Ed. 1165;

Lewis v. Frick, 233 U. S. 291, 300, 34 Sup. Ct. 488, 58 L. Ed. 967.

It is, however, equally well settled that if the immigration authorities act in an arbitrary or unfair manner and there is no substantial evidence upon which an adverse decision may be based, or the decision is contrary to law, the Courts have the right to set the decision aside and order the detained person discharged. The decision of these officials must find adequate support in the evidence.

Kwock Jan Fat v. White, 253 U. S. 454, 458, 40 Sup. Ct. 566, 64 L. Ed. 1010;

Zakonaite v. Wolf, 226 U. S. 272, 274, 33 Sup. Ct. 51, 57 L. Ed. 218;

Geigow v. Uhl, 239 U. S. 3, 9, 35 Sup. Ct. 661, 59 L. Ed. 1493, supra.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment and order appealed from should be reversed.

Dated, San Francisco,
September 16, 1931.

RUSSELL P. TYLER,
Attorney for Appellant.

No. 6536

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE GET NUEY,
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,
Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Pages

A—Statement of the Case 1

B—Facts of the Case 1

C—Argument 2

1. The Decision of the Immigration Tribunals was neither Arbitrary nor Capricious 2

Table of Authorities Cited

Chin Ching v. Nagle, (C. C. A.-9) No. 6426 (decided June 25, 1931) 3

Chin Share Nging v. Nagle, (C. C. A.-9) 27 F. (2d) 848 13

Louie Lung Gooey v. Nagle, (C. C. A.-9) 49 F. (2d) 1016 3, 14

Quan Jue v. Nagle, (C. C. A.-9) 35 F. (2d) 505 10

Soo Hoo Yen ex rel. Soo Hoo Do Yin v. Tillinghast, (C. C. A.-1) 24 F. (2d) 165 12

Tisi v. Tod, 264 U. S. 131 4

Tom Him v. Nagle, (C. C. A.-9) 27 F. (2d) 885 11

Tse Yook Kee v. Weedin, (C. C. A.-9) 35 F. (2d) 959 10

Weedin v. Jew Shuck Kwong, (C. C. A.-9) 33 F. (2d) 287 9

Weedin v. Lee Gock Doo, (C. C. A.-9) 41 F. (2d) 129 at 131 5

Weedin v. Yee Wing Soon, (C. C. A.-9) 48 F. (2d) 36 (decided Mar. 30, 1931) 8

Weedin v. Yip Kim Wing, (C. C. A.-9) 41 F. (2d) 665 8

Wong Sun Ying v. Weedin, (C. C. A.-9) 6415 (decided June 8, 1931) 11

Wong Foo Gwong v. Carr, (C. C. A.-9) 50 F. (2d) 360 (decided June 1, 1931) 12

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LEE GET NUEY,
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,
Appellee.

BRIEF FOR APPELLEE.

A.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court for the Southern Division of the Northern District of California, denying appellant's petition for a Writ of Habeas Corpus (Tr. 25 and 26).

B.

FACTS OF THE CASE.

The appellant is a male Chinese, aged 29 years, born in China, who was denied admission into the

United States by the Board of Special Inquiry at San Francisco, on the ground that he had not established satisfactorily that he is the son of an American citizen, Lee Share Dew (Tr. 14 to 22). That decision was affirmed on appeal by the Secretary of Labor (Tr. 22 to 25).

C.

ARGUMENT.

1. The decision of the immigration tribunals is neither arbitrary nor capricious.

Appellant's brief, with the exception of a single paragraph, is devoted entirely to matters which were given only incidental weight by the immigration tribunals. The vital conflicts, upon which the excluding decision was primarily based, have been passed over by appellant practically without mention.

Before discussing the material facts of this case, we point out that this is one of a large number of cases on the docket of this court, which involve merely issues of fact already passed upon by the statutory tribunals, reviewed on appeal by the Secretary of Labor and considered and passed upon by the court below, which found no arbitrary or capricious action on the part of the executive tribunals.

The limit of the review in these matters has so often been stated that citation of authorities is

scarcely necessary. This court in the very recent case of .

Louie Lung Gooey v. Nagle, 49 F. (2d) 1016, said:

> "We can not too often repeat that in immigration cases of this character brought before us for review, the question is not whether we, with the same facts before us originally, might have found differently from the Board; rather is it a question of determining simply whether or not the hearing was conducted with due regard to those rights of the applicant that are embraced in the phrase 'due process of law.' (Tang Tung v. Edsel, 223 U. S. 673.) Even if we were firmly convinced that the Board's decision was wrong, if it were shown that they had not acted arbitrarily but had reached their conclusions after a fair consideration of all the facts presented we should have no recourse. The denial of a fair hearing cannot be established by proving that the decision was wrong. (Chin Yow v. United States, 208 U. S. 8.)"

In

Chin Ching v. Nagle, No. 6426 (Decided June 25, 1931),

this court said:

> "Under the provisions of the statute the decision of a Board of Special Inquiry is final unless reversed on appeal to the Secretary of Labor. It is only to be reviewed on habeas corpus when the administrative officers have manifestly abused

the power and discretion conferred upon them. (Tulsidas v. Insular Collector, 262 U. S. 258, 263.) It is not the function of an appellate court in a habeas corpus proceeding to weigh the evidence or to go into the sufficiency of the probative facts. (White v. Young Yen, (C. C. A.) 278 Fed. 619; Low Wah Suey v. Backus, 225 U. S. 460, 468; Zakonaite v. Wolf, 226 U. S. 272, 274; Lewis v. Frick, 233 U. S. 291, 300; Kwock Jan Fat v. White, 253 U. S. 454, 457; Tulsidas v. Insular Collector, supra; Tisi v. Tod, 264 U. S. 131, 133.) This rule has been reiterated by this court in many similar cases, recently in Louie Lung Gooey v. Nagle, No. 6367, decided May 18, 1931. Thus leaving the 'administration of the law where the law intends it should be left; to the attention of officers made alert to attempts at evasion of it and instructed by experience of the fabrications which will be made to accomplish evasion.' (Tulsidas v. Insular Collector, supra.)"

In

Tisi v. Tod, 264 U. S. 131,

the Supreme Court said:

"We do not discuss the evidence; because the correctness of the judgment of the lower court is not to be determined by inquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found."

We proceed now to consider the evidence, and particularly the vital conflicts in the testimony upon which the executive decision was primarily based.

Testimony was given in appellant's behalf before the Board of Special Inquiry by appellant and by the alleged father. An alleged acquaintance, Lee Lin Sing, also testified. His testimony, however, is based on a single meeting with appellant alleged to have taken place in China in May, 1928. It is without substantial probative force on the issue of the relationship asserted.

> *Weedin v. Lee Gock Doo,* (C. C. A.-9) 41 F. (2d) 129 at 131, (concurring opinion of Judge Dietrich).

Appellant testified that his family consists of:

1. A son born July 15, 1923.

2. Another son born in July or August, 1924, *who died in his home in China in the 12th month of 1924 while his alleged father was in China on his most recent visit.*

3. A daughter born June 12, *1926* (Res. Ex. "A," p. 25).

On August 12, 1924, appellant's alleged father first testified relative to the existence of a son whom this appellant claims to be. He then testified that he had a son named "Lee Gick Nuey", and that the latter at that time *had two sons and one daughter.*

Appellant, according to his own testimony, had no daughter at that time. His daughter was not born until two years later. But let us now consider the testimony given by appellant's alleged father in connection with the present application.

Appellant's alleged father now testifies that appellant never had but two children, a son born in 1923 and a daughter born in 1926 (Resp. Ex. "A", p. 11). Appellant's testimony is that he had a second son born in July or August, 1924, *and that this son died in his home in China, while the alleged father was there on his most recent visit* (Resp. Ex. "A", p. 25). The testimony is that appellant and his alleged father *were then living in the same house in China* (Resp. Ex. "A", p. 26).

The situation therefore is this: In 1924 the alleged father first claimed to have a son, one "Lee Gick Nuey", living in China. He then testified that this alleged son had three children. He now testifies, however, that this appellant in 1924 had only one child. He testifies further that this appellant never had any other child except a daughter who was born in 1926, whereas appellant's testimony is that he had a second son who died in the latter part of 1924 in the house in which the alleged father was then living.

The present testimony of the alleged father, therefore, not only is in flagrant contradiction of the testimony which he gave in 1924, but also flatly contra-

dicts appellant's testimony. If these parties were actually father and son, living in the same house while the former was last in China from September, 1924, to December, 1925, there certainly could be no such disagreement.

Just such conflicts as these have uniformly been held to be sufficient basis for an excluding decision of the immigration tribunals on the ground that the asserted relationship was not satisfactorily made out. Before considering the authorities, however, let us first examine the other conflicts in the case at bar relative to vital matters of relationship and pedigree.

The alleged father testified that his mother was "Ho Shee" (Resp. Ex. "A", p. 12). Appellant testified that his paternal grandmother was "*Hung* Shee", *and that she died in his home in 1919* (Resp. Ex. "A", p. 26). Appellant in 1919 would have been eighteen years of age, and if he were actually a member of this family, certainly there would be no such conflict as to the name of his grandmother.

Furthermore, when in 1924 appellant's alleged father first laid claim to having such a son in China as appellant claims to be, he testified that his son was named "Lee Gick Nuey" (Resp. Ex. "C", p. 15). In 1925 he testified that his oldest son was "Lee Nuey Gat" (Resp. Ex. "C", p. 21). In connection with the present application he testified that appellant is his oldest son and that his name is "Lee Get Nuey" (Resp. Ex. "A", p. 11). Appellant claims the names of "Lee Get Nuey" and "Lee Chung

Din", and testified that he has no other names (Resp. Ex. "A", p. 7).

All the foregoing conflicts relate directly to family matters. Decisions upon similar conflicts are numerous.

In

Weedin v. Yee Wing Soon, (C. C. A.-9) 48 F. (2d) 36, decided Mar. 30, 1931,

there was "complete accord" in the testimony upon a multitude of details, but a discrepancy "difficult if not impossible to reconcile with the alleged relationship". The alleged father testified that his mother died in his home during the previous year. The appellee testified that his grandmother died not in his house but in the house of an alleged brother. It was held that such a discrepancy was inconsistent with the relationship asserted, and that the order discharging the appellee from the custody of the immigration authorities must therefore he reversed.

Likewise, in

Weedin v. Yip Kim Wing, (C. C. A.-9) 41 F. (2d) 665,

the major discrepancies as to family matters were as follows:

1—A discrepancy as to just when the alleged grandparents died.

2—A discrepancy as to whether the alleged grandfather was named Jin *Nay* Hung or Jin *Lee* Hung.

3—A discrepancy as to whether there had been an older brother of the appellee who had died before the birth of the latter.

This court said:

> "In view of these discrepancies in the testimony relied upon by the applicant, we cannot say that the applicant was denied a fair hearing on the question of his right to enter the United States."

In

Weedin v. Jew Shuck Kwong, (C. C. A.-9) 33 F. (2d) 287,

the conflicts related mainly to whether or not certain relatives had lived in the appellee's home in years past and as to how many sons the alleged father had. Circuit Judge Rudkin said:

> "The discrepancies to which we have referred, and other minor ones, *did not relate to unimportant objects or incidents outside of the family and home which may not be observed at all or are soon forgotten. They related to facts connected with the immediate home life of the family, which were necessarily within the personal knowledge of the several witnesses, if the claim of relationship in fact existed.* For this reason we are of opinion that the testimony in support of the claim of relationship was so far discredited that the department was justified in finding that such claim was not satisfactorily established."

In each of those three cases the lower court had upheld the petitioner's right to be discharged. Never-

theless, because of those discrepancies, it was held in each case that the order discharging the appellee must be reversed.

In

Tse Yook Kee v. Weedin, (C. C. A.-9) 35 F. (2d) 959,

discussing the single discrepancy as to whether the appellant's alleged grandmother had bound feet or natural feet, Circuit Judge Dietrich said:

> "She lived in the little village of only five or six houses where the applicant claims to have been born and reared, *and of her all should have had exact knowledge.*"

In

Quan Jue v. Nagle, (C. C. A.-9) 35 F. (2d) 505,

there were conflicts as to whether appellant's alleged grandmother had natural feet or unbound feet, as to the times of death of the alleged grandparents and as to whether at one time two adopted sons of an alleged uncle had lived in the family home in China. Circuit Judge Dietrich said:

> "We are unable to say that the Immigration officers acted arbitrarily, capriciously or unreasonably in declining to believe applicant and his two brothers."

In

Tom Him v. Nagle, (C. C. A.-9) 27 F. (2d) 885,

Circuit Judge Rudkin said:

> "It will thus be seen that there were discrepancies in the testimony *relating to matters of family history, which would not exist if the claim of relationship was well founded.*"

Clearly the several conflicts in the testimony offered in this appellant's behalf relative to how many children he had in 1924; relative to whether he had a second son who died in 1924 in the house in China in which it is claimed both appellant and his alleged father were then living; relative to the name of appellant's grandmother, who is said to have died in his home when he was 18 years old; and relative to the name of the alleged son of Lee Share Dew, who this appellant claims to be, are fully as vital as those considered in the cases which we have cited above.

In the recent case of

Wong Sun Ying v. Weedin, (C. C. A.-9) 6415 (decided June 8, 1931),

this court said:

> "If the subject is psychologically important and if it concerns the intimate family life, then a discrepancy with reference to it is inconsistent with the alleged relationship. This is the essence

of the test used by this court in the case of *Weedin vs. Yee Wing Soon,* 48 F. (2d) 37."

In

Wong Foo Gwong v. Carr, (C. C. A.-9) 50 F. (2d) 360 (decided June 1, 1931),

this court said:

"The immigration officials must necessarily base their decisions upon conflicts or agreements that arise in the testimony of applicants for admission and that of their witnesses. * * * With the burden of proof of the relationship on the applicant, as it is here, when the texture of the testimony that is usually relied upon as the basis of comparison is hopelessly shot with holes there is certainly no 'abuse of discretion' and no arbitrariness if the application is refused."

Regarding the fact that each time the alleged father testified before the immigration authorities relative to the existence of an alleged son who this appellant claims to be, viz.: in 1924, in 1925 and in 1930, he gave a different name as that of said son. The following authorities are pertinent:

In

Soo Hoo Yen ex rel. Soo Hoo Do Yin v. Tillinghast, (C. C. A.-1) 24 F. (2d) 165,

the court held:

"The question remains whether there was such a conflict of evidence that different conclusions

might be reached as to the relationship of the applicant to the alleged father; for, if there was, the conclusion of the Department of Labor is final.

Briefly stated, the evidence given by the alleged father was that in 1911 he had only one son, Soo Hoo Do Tung; that in 1913 he had two sons, Soo Hoo Do Tung and Soo Hoo Do Young; that in 1916 he changed the name of Soo Hoo Do Tung to Soo Hoo Do Yim; and that prior to 1916 the name by which the applicant was known and called was Soo Hoo Do Tung.

The evidence of the applicant as to this was that he never had a brother by the name of Soo Hoo Do Tung or Do Teung, and that he was never known or called by either name.

In this state of the evidence, we think different conclusions could be drawn as to the claimed relationship."

In

Chin Share Nging v. Nagle, (C. C. A.-9) 27 F. (2d) 848,

the court considered as a major discrepancy the fact that the name given for the appellant differed from the name which the alleged father had in 1914 stated as the name of his son.

The only comment made in appellant's brief relative to any of these various conflicts as to family matters is the suggestion that when on August 12, 1924 the alleged father testified that his oldest son

had two sons and one daughter, he was testifying from hearsay, as he had not himself been in China for a number of years. Appellant's brief makes no mention whatsoever of the various other contradictions which we have discussed above, and even as to the alleged father's testimony in 1924 that his oldest son then had two sons and one daughter, the alleged father when confronted with that testimony in connection with the present application, offered no such explanation as is suggested in the brief (Resp. Ex. "A" p. 11).

In each of the cases cited in appellant's brief the discrepancies related solely to collateral matters of a trivial nature which might not be observed at all, or, if observed, might easily be forgotten. In none of those cases were there conflicts in the testimony relative to family matters such as are presented in the case at bar. This case is also distinguishable from those for another reason, viz.: here there is no "overwhelming weight of evidence" consisting of testimony and declarations of numerous alleged relatives over a period of many years.

Louie Lung Gooey v. Nagle, supra.

In view of the vital conflicts which we have discussed above, we deem it wholly unnecessary to take up the time of the court with a detailed consideration of the minor points which were merely mentioned incidentally by the immigration tribunals in arriving at their decision.

We submit that no arbitrary or capricious action on the part of the immigration tribunals has been shown, and that the decision of the court below should be affirmed.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney,

H. A. VAN DER ZEE,
Assistant United States Attorney,
Attorneys for Appellee.

No. 6537

United States

Circuit Court of Appeals

For the Ninth Circuit.

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,

Appellant,

vs.

EDDY'S STEAM BAKERY, INC., a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Parker Printing Company, 545 Sansome Street, San Francisco 8-14-31—60

No. 6537

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Attorneys' Names and Addresses	1
Answer	22
Assignment of Errors	75
Bill of Exceptions	25
Caption	1
Complaint	2
Citation	83
Clerk's Certificate to Transcript	88
Decision of the Court	65
Judgment	73
Notice of Entry of Judgment	74
Order Allowing Appeal	82
Order Extending Time to File Transcript	86
Order Extending Time to File Transcript	87
Order to Transmit Original Exhibits	87
Petition for Special Finding	71
Petition for Appeal	79
Prayer for Reversal	81
Praecipe for Transcript	84
Special Finding and Certificate	72

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

WELLINGTON D. RANKIN, Esq., of Helena, Montana, United States Attorney for the District of Montana, ARTHUR P. ACHER, Esq., of Helena, Montana, Assistant United States Attorney for the District of Montana, Attorneys for the Appellant.

T. B. WEIR, Esq., and Harry P. Bennett, Esq., of Helena, Mont., Attorneys for Appellee.

In the District Court of the United States for the District of Montana.

No. 1399

EDDY'S STEAM BAKERY, INC.,
a Corporation,
Plaintiff,

vs.

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,
Defendant.

BE IT REMEMBERED, that on the 29th day of July 1929, Plaintiff filed its complaint herein in the words and figures following, to-wit: [1*]

---

*Page number appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States, for the District of Montana.

#1399

EDDY'S STEAM BAKERY, INC.,
a Corporation,

Plaintiff,

vs.

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,

Defendant.

COMPLAINT.

Comes now the plaintiff above named and for its cause of action against the defendant above named, shows and avers:

I.

That at all times herein referred to, ever since said times and now, this plaintiff was and is a corporation organized and existing under the laws of the State of Montana, with its principal place of business located at the City of Helena, in the County of Lewis and Clark, State of Montana. That this plaintiff corporation was so organized under the laws of the State of Montana, February 21, 1918, with the corporate name O'Connell and Gallivan Company, and that thereafter and on July 9, 1923, pursuant to the laws of said State of Montana, this plaintiff's corporate name was changed to "Eddy's Steam Bakery, Inc.", by an amendment of the Articles of Incorporation duly made and filed as required by the laws of said last named State. [2]

II.

That the defendant C. A. Rasmusson is now, and ever since the 16th day of January, 1922, has been, a resident and citizen of the State of Montana and the duly appointed, qualified and acting Collector of Internal Revenue for the District of Montana, residing at Helena, within the State of Montana.

III.

That on or about February 9, 1926, the Commissioner of Internal Revenue, purporting to act under the provisions of the Act of Congress commonly referred to as the "Revenue Act of 1921", being the Act of Congress approved November 23, 1921, and particularly under Sections 230 and 301 of Chapter 136 of said Act, and Acts of Congress amendatory thereof and supplemental thereto, did wrongfully and unlawfully levy and assess against this plaintiff income and excess profits taxes termed deficiency assessment as designated in said Act for the calendar year of 1921, in the sum of Three Thousand and Thirty-seven and 41/100 Dollars ($3037.41), as set forth in the letter of said Commissioner of date February 9, 1926, bearing said Commissioner's reference "IT:CA: 2551—9—60D", a true and exact copy of which letter is hereto attached, marked Exhibit "A", and by this reference made a part hereof.

IV.

That thereafter said defendant Collector did demand of this plaintiff said sum of Three Thousand

and Thirty-seven and 41/100 Dollars ($3,037.41), together with Seven Hundred and Eighty-two and 22/100 Dollars ($782.22) interest thereon under said Acts of Congress, making a total demanded by said defendant Collector of this plaintiff of the sum of Three [3] Thousand Eight Hundred and Nineteen and 63/100 Dollars ($3,819.63), alleging the same to be due from this plaintiff as such tax so levied by the Commissioner as aforesaid, and pursuant to said demand and by reason of the coercion incident to said assessment, demand and the administrative provisions of said Acts of Congress and the rules and regulations promulgated under said Act for the collection of taxes assessed thereunder, this plaintiff did, on or about November 17, 1926, pay to said Collector at Helena, in Lewis and Clark County, Montana, said sum of Three Thousand Eight Hundred and Nineteen and 63/100 Dollars ($3,819.63) under protest.

V.

That thereafter and on or about March 6th, 1929, this plaintiff filed with said Collector its Claim on form 843 for refund of said taxes so paid, duly verified and sworn to, a copy of which claim and supporting affidavit is hereto attached, marked Exhibit "B", and by this reference made a part of this complaint.

VI.

That in support of said claim there was filed therewith Power of Attorney duly executed by

plaintiff in favor of Hugh D. Galusha of Helena, Montana, a true copy of which Power of Attorney is hereto attached, marked Exhibit "C", and by this reference made a part of this complaint.

VII.

That thereafter and on or about July 12, 1929, said Collector and said Commissioner of Internal Revenue disallowed, denied and refused said claim of refund and so notified this plaintiff by letter, a true copy of which is [4] hereto attached, marked Exhibit "D", and by this reference made a part of this comlpaint.

VIII.

That prior to December 31, 1920, plaintiff granted, sold, transferred and delivered to one J. E. O'Connell of Helena, Montana, all its property and business.

IX.

That said alleged tax and the assessment, and the whole thereof, is wrongful, unlawful and void, in this that, this plaintiff transacted no business whatever during the calendar year 1921, or any part thereof, and that this plaintiff neither earned, nor received, nor acquired, nor was entitled to any income or profits whatsoever for or during said calendar year 1921.

X.

That said tax and the assessment thereof and said interest thereon was and is wholly unlawful and void.

XI.

That said defendant Collector has refused as aforesaid, and still refuses to return or pay to this plaintiff said Three Thousand Eight Hundred and Nineteen and 63/100 Dollars ($3,819.63), or any part thereof, and so wrongfully and unlawfully holds and retains said Three Thousand Eight Hundred and Nineteen and 63/100 Dollars ($3,819.63) so as aforesaid the money and property of this plaintiff in his possession, and that on said account there is now due and owing from the said defendant to this plaintiff the sum of Three Thousand Eight Hundred and Nineteen and 63/100 Dollars ($3,819.63), together with lawful interest, to-wit, interest at the rate of one-half of one per cent a month, [5] upon said last named sum from November 17, 1926, until paid.

WHEREFORE, Plaintiff prays judgment against the defendant for the sum of Three Thousand Eight Hundred and Nineteen and 63/100 Dollars ($3,819.63), together with interest thereon at the rate of six per cent (6%) per annum from November 17, 1926, together with its costs of suit herein expended.

EDDY'S STEAM BAKERY, INC.,
By J. E. O'CONNELL,
Its President.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.
Address: Helena, Montana. [6]

State of Montana,
County of Lewis and Clark.—ss.

J. E. O'Connell, being first duly sworn, deposes and says:

That he is an officer of Eddy's Steam Bekery, Inc., the corporation plaintiff making the foregoing complaint, to-wit, its President, and as such officer makes this verification for and on behalf of said corporation; that he has read the foregoing complaint and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

J. E. O'CONNELL.

Subscribed and sworn to before me this 29th day of July, 1929.

(Notarial Seal) HARRY P. BENNETT,
Notary Public for the State of Montana, Residing at Helena, Montana.

My Commission expires September 26, 1931. [7]

EXHIBIT "A"

Form NP-2

Office of
Commissioner of Internal Revenue.
TREASURY DEPARTMENT
Washington.

IT:CA:2551-9-60D

Eddy Steam Bakery, Inc., Feb 9 1926
Formerly O'Connell and Gallavin Co.,
Helena, Montana.

Sirs:

The determination of your income tax liability for the years 1921 and 1922, pursuant to an examination of your books of account and records, discloses a deficiency in tax amounting to $3,037.41 for 1921 and an overassessment amounting to $219.71 for 1922, as shown by the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that Board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the

final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: CA:2551-9-60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,
D. H. BLAIR
Commissioner
By
Assistant to the Commissioner.

Inclosures:
Statements
Agreement - Form A
Form 882

caw-2

Form 7861—Revised May, 1925. 2-13281 [8]

STATEMENT.

IT:CA:2551-9-60D

In re: Eddy Steam Bakery, Inc.
Formerly O'Connell and Gallavin Co.,
Helena, Montana.

Year	Deficiency in Tax	Overassessment.
1921	$3,037.41	
1922		$219.71
Net deficiency	$2,817.70	

1921

Net income disclosed by books		$13,370.74
Add:		
1. Excessive depreciation		120.00
Net income adjusted		$13,490.74

1. The value of a lot at $4,000.00 was included with depreciable assets, and depreciation computed thereon at 3%, which has been disallowed.

Capital stock and surplus		$48,792.68
Deduct:		
1. Federal income tax, 1920, ($3,009.99 x .4226)	$1,272.02	
2. Additional tax, 1918-1919	1,683.65	
3. Dividends paid	6,314.00	9,269.67
Invested capital adjusted		$39,523.01

1. Federal income tax for 1920 has been prorated from the date due and payable. (Article 845, Regulations 62)

2. Additional tax for prior years, outstanding at the beginning of the years, has been deducted. (Article 845, Regulations 62)

3. Dividends have been prorated in accordance with Article 858, Regulations 62, and deducted. [9]

Eddy Steam Bakery, Inc.	Statement.
8% of invested capital	$3,161.84
Exemption	3,000.00
Excess profits credit	$6,161.84

% of Capital	Net Income	Credit	Balance	Rate	Tax
20%	$7,904.60	$6,161.84	$1,742.76	20%	$ 348.55
Balance	5,586.14	——	5,586.14	40%	2,234.46
Totals	$13,490.74	$6,161.84	$7,328.90		$2,583.01

PROFITS TAX UNDER SECTION 302

Net income		$13,490.74	
Exemption		3,000.00	
Balance taxable at 20%		$10,490.74	
Total tax assessable at 20%			$2,098.15
Net income		$13,490.74	
Less:			
Profits tax	$2,098.15		
Exemption	2,000.00	4,098.15	
Balance taxable at 10%		$ 9,392.59	939.26
Total tax assessable			$3,037.41
Original tax			None
Deficiency in tax			$3,037.41

1922

Net income disclosed by books	$14,134.08
Add:	
1. Donations	5.00
2. Federal income tax	257.21
3. Excessive depreciation	120.00
Net income adjusted	$14,516.29

[10]

Eddy Steam Bakery, Inc. Statement.

1. Donations are not allowable deductions from net income. (Article 562, Regulations 62)

2. By a specific provision of the statute, Federal income tax is not an allowable deduction. (Section 234, Revenue Act of 1921.)

3. See explanation #1, net income for 1921.

Net income	$14,516.29	
Exemption	2,000.00	
Balance taxable at 12½%	$12,516.29	
Total tax assessable		$1,564.54
Original tax		1,784.25
Overassessment		$ 219.71

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1921, the Bureau will be unable to afford you an opportunity under the provisions of Treasury Decision 3708 to discuss your case before mailing formal notice of its determination as provided by Section 274(a) of the Revenue Act of 1924. It is necessary at this time, in order to protect the interests of the Government, either to

make an immediate assessment under the provisions of Section 274(d) of the Revenue Act of 1924 or to issue a formal notice of deficiency. Therefore the Bureau has elected to issue this notice of deficiency believing it will be more satisfactory than an immediate assessment.

The overassessment shown herein will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district, and will be applied by that official in accordance with Section 281 of the Revenue Act of 1924.

The right of appeal as indicated on page 1 of this letter refers only to any deficiency in tax indicated herein inasmuch as there is no provision in the Revenue Act of 1924 granting the right of appeal against a determination of any overassessments found upon an audit of your returns.

Payment of the deficiency should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

caw-2 [11]

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
FORM 843—Jan. 1922
Supersedes General U. S.
January 15, 1922

CLAIM FOR

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☒ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

COLLECTOR'S NOTATION
District
Account number
Date received
Stamp here
Collector of Internal Revenue

IMPORTANT

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

State of Montana,
County of Lewis & Clark ss:

NOTICE TO COLLECTOR

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit

Stamp here

Eddy's Steam Bakery, Inc., formerly

TYPE OR PRINT

O'Connell and Sullivan Co.

Helena (Residence—give street and number as well as city or town and State) Montana

(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

PERIOD	YEAR
From: Dec. 31	19 20
To: Dec. 31	19 21

1. Business in which engaged Bakery
2. Character of assessment or tax (State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased $ 3,037.41
4. Reduction of Tax Liability requested (Income and Profits Tax) $
5. Amount to be abated $
6. Amount to be refunded (or such greater amount as is legally refundable) $ 3,037.41
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) Nov.17,1926,$3567.50 Credit& Overpayment 1922,$219.71 and Interest $32.62
   (If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed Montana
9. District in which unpaid assessment appears
10. Amount of overpayment claimed as credit $
11. Unpaid assessment against which credit is asked; period from ..... to ..... $

Deponent verily believes that this application should be allowed for the following reasons:

Claim is also made for refund of interest $782.22 paid Nov.17,1926
Claim is based on facts set forth in Exhibit "A" hereto attached and by this reference made a part of this verified claim as fully as if set forth at length in this space.

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 5th day of March, 1929

L. H. West
Notary Public for the State of Montana
Residing at Helena, Montana.
My commission expires April 20, 1930.
(SEAL)

(This affidavit may be sworn to before a Deputy Collector of Internal Income or Revenue Agent without charge.)

Signed:
Eddy's Steam Bakery, Inc.,
Per Hugh D. Galusha
Attorney-In-Fact

12

Exhibit "B"

CERTIFICATES

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as t the assessment and payment of the tax:

Name of taxpayer.	Character of assessment and period covered.	List.	Year.	Month.	Page.	Line.	Amount.	Date paid.	District in which paid.
							$		

Collector of Internal Revenue

Assessment Clerk, Commissioner's Office

Claim No.

I certify that the records of my office show the following facts as to the purchase of stamps:

To whom sold or issued.	Kind.	Number.	Denomination.	Date of sale or issue.	Amount.	If special tax stamp, state: Serial number.	If special tax stamp, state: Period commencing—
					$		

Collector District

Schedule No.

Schedule Number District

Allowed or Rejected Number (Nature of tax.)

Claimant

Address

Examined and submitted for action , 19

COMMITTEE ON CLAIMS

Claim examined by—
Claim approved by—
Chief of Division.

Amount claimed $

Amount allowed $

Amount rejected $

EXHIBIT "A" attached to and a part of Form 843 by Eddy's Steam Bakery, Inc., (Commissioner's Reference: IT:CA: 2551-9-60D).

State of Montana,
County of Lewis and Clark.—ss.

Hugh D. Galusha, being first duly sworn, deposes and says:

1. That at all times herein referred to, ever since said times and now, this claimant was and is a corporation organized and existing under the laws of the State of Montana, with its principal place of business located at the City of Helena, in the County of Lewis and Clark, State of Montana. That this claimant corporation was so organized under the laws of the State of Montana, February 21, 1918, with the corporate name O'Connell and Gallivan Company, and that thereafter and on July 9, 1923, pursuant to the laws of said State of Montana, this claimant's corporate name was changed to "Eddy's Steam Bakery, Inc.", by an amendment of the Articles of Incorporation duly made and filed as required by the laws of said last named State, and that ever since said last named date this claimant has been and now is doing business under the laws of the State of Montana, at the City of Helena, in Lewis and Clark County, Montana.

2. That C. A. Rasmusson is now, and ever since the 16th day of January, 1922, has been, a resident and citizen of the State of Montana and the duly appointed, qualified and acting Collector of Internal

Revenue for the District of Montana, residing at Helena, within the State of Montana.

3. That on or about February 9, 1926, the Commissioner of Internal Revenue, purporting to act under the provisions of the Act of Congress commonly referred to as the "Revenue Act of 1921", being the Act of Congress approved November 23, 1921, and particularly under [13] Sections 230 and 301 of Chapter 136 of said Act, and Acts of Congress amendatory thereof and supplemental thereto, did wrongfully and unlawfully levy and assess against this claimant income and excess profits taxes terms deficiency assessment as designated in said Act for the calendar year of 1921, in the sum of Three Thousand and Thirty-seven and 41/100 Dollars ($3,037.41), as set forth in the letter of said Commissioner of date February 9, 1926, bearing said Commissioner's reference "IT:CA: 2551-9-60D", a true and exact copy of which letter is hereto attached, marked Exhibit "B", and by this reference made a part hereof.

4. That thereafter said Collector did demand of this Claimant said sum of Three Thousand and Thirty-seven and 41/100 Dollars ($3,037.41), together with Seven Hundred and Eighty-two and 22/100 Dollars ($782.22) interest thereon under said Acts of Congress, making a total demanded by said Collector of this Claimant of the sum of Three Thousand Eight Hundred and Nineteen and 63/100 Dollars ($3,819.63) alleging the same to be due from this Claimant as such tax so levied by the Com-

missioner as aforesaid, and pursuant to said demand and by reason of the coercion incident to said assessment, demand and the administrative provisions of said Acts of Congress and the rules and regulations promulgated under said Act for the collection of taxes assessed thereunder, this Claimant did, on or about November 17, 1926, pay to said Collector, at Helena, in Lewis and Clark County, Montana, said sum of Three Thousand Eight Hundred and Nineteen and 63/100 Dollars ($3,819.63) under protest.

5. That prior to December 31, 1920, Claimant granted, sold, assigned, transferred and delivered to J. E. O'Connell of Helena, Montana, all of its property and business; that said alleged tax and the assess- [14] ment, and the whole thereof, is wrongful, unlawful and void, in this that, this Claimant transacted no business whatever during the calendar year 1921, or any part thereof, and that this Claimant neither received, nor earned, nor acquired, nor was entitled to any income or profits whatsoever for or during said calendar year 1921.

6. That said tax and the assessment thereof, and said interest thereon, was and is wholly unlawful and void.

7. That attached hereto, as Exhibit "C", is the duly executed Power of Attorney from Claimant to Hugh D. Galusha, which power and agency has never been revoked or terminated and is in full force and effect.

HUGH D. GALUSHA.

Sworn to and subscribed before me this 5th day of March, 1929.

(Seal) L. H. WEST,
Notary Public for the State of Montana,
Residing at Helena, Montana.
My Commission expires April 20, 1930.

Received
Collector of Internal Revenue,
District of Montana.
Mar 6 1929
Helena Office. [15]

POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS:

That Hugh D. Galusha of Helena, Montana, be, and he is hereby, made and constituted the true and lawful agent and attorney-in-fact for the undersigned Eddy's Steam Bakery, Inc., a Montana corporation, to, for it and in its name, place and stead, or in his own name, demand, collect, adjust, compromise, handle, manage and receipt for any and all claims and moneys due to the undersigned Eddy Steam Bakery, Inc., from the United States of America, and particularly to represent and act for the undersigned before the Treasury Department of the United States in all matters concerning or in connection with income taxes for the years 1921 and subsequent years. And said agent and attorney-in-fact, is hereby fully empowered to do all things in said premises as fully as the under-

signed might itself do, including the verification of any Bill of Complaint filed in any court for the recovery of any such taxes, and with power of substitution of another agent and attorney in his stead with the same powers as the agent herein named.

IN WITNESS WHEREOF, the undersigned Eddy's Steam Bakery, Inc., has caused its corporate name and seal to be hereunto affixed by its proper officers, hereto duly authorized, this 23rd day of February, 1929.

EDDY'S STEAM BAKERY, INC.
By J. E. O'CONNELL,
Its President.

Attest:
J. F. O'CONNELL,
Secretary.

Witnesses:
BESS WALSH
JENNIE TUFTE (Corporate Seal)

Received
Collector of Internal Revenue
District of Montana
Mar 6, 1929
Helena Office. [16]

EXHIBIT "C"

State of Montana,
County of Lewis and Clark.—ss.

On this 23rd day of February, A. D. 1929, before me L. H. West, a Notary Public for the State of

Montana, personally appeared J. E. O'Connell and J. F. O'Connell known to me to be respectively the President and Secretary of Eddy's Steam Bakery, Inc., the Montana corporation executing the foregoing instrument, and each for himself acknowledged to me that such corporation executed said instrument for the purposes therein stated; and I further certify that I read and fully explained said instrument and warrant of attorney to each of said affiants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this Certificate first above written.

(Seal) L. H. WEST,
Notary Public for the State of Montana,
Residing at Helena, Montana.
My Commission expires Apr. 20, 1930.

Received
Collector of Internal Revenue,
District of Montana.
Mar 6 1929
Helena Office. [17]

EXHIBIT "D".

TREASURY DEPARTMENT
Washington

Jul 12 1929

Office of
Commissioner of Internal Revenue

IT:C:CC—
Eddy's Steam Bakery, Incorporated,
Formerly O'Connell & Gallivan Company,
Helena, Montana.
In re: Refund Claim for Year 1921
Amount $3,037.41

Sirs:

Your claim for refund of taxes, above referred to, was disallowed by the Commissioner on a schedule dated July 12, 1929.

Respectfully,
C. B. ALLEN,
Deputy Commissioner.
By CHARLES P. SUMAN,
Head of Division.

[Endorsed]: Filed July 29, 1929. [18]

THEREAFTER, on the 20th day of January, 1930, the answer of the defendant to said complaint was duly filed herein, in the words and figures following, to-wit:

(Title of Court and Cause.)

ANSWER.

Comes now C. A. Rasmusson, the defendant herein, the duly appointed, qualified and acting Collector of Internal Revenue for the District of Montana, and for answer to plaintiff's complaint on file herein, admits, denies and alleges as follows, to-wit:

I.

Admits the allegations of Paragraphs I, II, V, VI and VII thereof.

II.

Answering the allegations of paragraph III thereof, defendant admits that the Commissioner assessed against said plaintiff income and excess profits taxes for the calendar year 1921 in the amount of $3,037.41 as set forth in plaintiff's Exhibit A, but states that said assessment was made on or about June 3, 1926, rather than February 9, 1926 as alleged by plaintiff; denies the levy and assessment of said tax was wrongfully or unlawfully made.

III.

Answering the allegations of Paragraph IV thereof, defendant denies that he demanded of plaintiff the sum of $3,037.41 and alleges the fact to be that the demand was for $2,817.70 together with interest of $782.22, the said sum of $3,037.41 having been reduced by crediting thereon an overpayment made by plaintiff of income taxes for the year 1922 in the amount of $219.71, making a total of $3,599.92 demanded by said defendant of the

plaintiff, which sum was paid by the plaintiff on or about November 19, 1926, rather than November 17, 1926, as alleged by the plaintiff but defendant denies that said payment was made by reason of any coercion incident to the assessment and demand of said tax. [19]

IV.

Defendant denies each and every allegation, matter and thing contained in Paragraphs VIII, IX and X thereof.

V.

Answering the allegations of Paragraph XI thereof, defendant admits that he has refused and still refuses to return or pay this plaintiff the amount of $3,819.63; but denies he wrongfully and unlawfully holds and retains said $3,819.63 or any other sum as the money and property of the plaintiff; and further denies that on said account there is due and owing from the defendant to the plaintiff the sum of $3,819.63 with lawful interest thereon from November 17, 1926 or any other sum.

Denies each and every allegation, matter and thing not hereinbefore specifically admitted or denied.

WHEREFORE, having fully answered defendant prays that he be dismissed hence with his just costs herein incurred.

WELLINGTON D. RANKIN,
United States Attorney,
For the District of Montana.
ARTHUR P. ACHER,
Assistant United States Attorney
Attorneys for Defendant.

United States of America,
District of Montana.—ss.

Arthur P. Acher, being first duly sworn, deposes and says: that he is an Assistant United States Attorney for the District of Montana and one of the attorneys for the defendant herein; that as such makes this verification; that he has read the contents of the foregoing answer and that the same are true according to the best of his knowledge, information and belief.

ARTHUR P. ACHER.

Subscribed and sworn to before me this 20th day of January, 1930.

H. L. ALLEN,
Deputy Clerk,
(Seal) U. S. District Court.

[Endorsed]: Filed Jan 20-1930. [20]

THEREAFTER, on July 16th, 1930, a stipulation in writing was duly filed in the above entitled cause in words and figures following:

(Title of Court and Cause.)

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto acting by and through their respective counsel:

That a jury may be waived and that the above-entitled cause may be tried to the court sitting without a jury.

T. B. WEIR,
Attorney for Complainant.
ARTHUR P. ACHER
Assistant United States Attorney
for the District of Montana.
Attorney for the Defendant.

[Endorsed]: Filed July 16, 1930

THEREAFTER, on June 16, 1931, a Bill of Exceptions in said cause was duly signed, settled and allowed in words and figures following:

(Title of Court and Cause.)

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that this cause came on regularly for hearing before the Honorable George M. Bourquin in the above entitled Court on the 16th day of July, 1930, T. B. Weir and Harry P. Bennett appearing as Attorneys for the Plaintiff and Wellington D. Rankin, United States Attorney, and John R. Wheeler, Esquire, special Attorney, appearing for the defendant, and the parties hereto having entered into and filed herein their stipulation in writing that a Jury might be waived, and that the above entitled cause might be tried to the Court sitting without a Jury; Thereupon the following proceedings were had:

The COURT. Case on trial.

Mr. RANKIN. If the Court please: At this time I move the admission of John R. Wheeler, Special Representative of the Government.

The COURT. You mean, for this case? [21]

Mr. RANKIN. For this case.

The COURT. It may be done.

Mr. WEIR. If the Court please: This case No. 1399, Eddy's Steam Bakery, Incorporated, vs. C. A. Rasmussen, Collector. The action is against the Collector to recover approximately $3800.00 in income taxes; that is, principal and interest in income taxes paid by the plaintiff here after the assessment levied by the Commissioner in 1926. The tax is for the year 1921. The only issue left in the case after the pleadings is the question of whether or not the corporation, plaintiff, conducted this business, or any business, in 1921, or, as the plaintiff contends, the business was conducted by the individual O'Connell.

I call the Court's attention to the title, Eddy's Steam Bakery. In 1920, 1921 and 1922 the name was O'Connell and Gallivan Company, the name having been changed in '23 or thereabouts. There is no question as to the amount, in taxes, so this amount is proper.

The COURT. Somebody did business, and it was charged up to this plaintiff.

Mr. WEIR. Somebody did business and it was charged up to this plaintiff, the income for the year in question.

The COURT. He paid the taxes?

Mr. WEIR. Yes, sir; paid the taxes.

The COURT. Wouldn't the tax be higher for the corporation.

The COURT. Than the individual?

Mr. WEIR. Yes, for this particular year; that is one of the chief motives in undertaking the change.

The COURT. I imagined there was something. Very well.

J. E. O'CONNELL being called as a witness on behalf of the plaintiff was duly sworn and testified as follows:

Direct Examination by Mr. WEIR.

My name is J. E. O'Connell. I have lived at Helena, Montana for twenty-two years. I am President of the plaintiff corporation, the Eddy Steam Bakery, Incorporated. I have been President of that Corporation since 1920. I am familiar with the affairs of this plaintiff corporation during, up to the end of 1921. The plaintiff corporation did not transact any business whatever in the year 1921. [22]

2. Did the plaintiff corporation have, or receive, or was it entitled to any income or profits for or in the year 1921?

Mr. WHEELER. Object to that as calling for the conclusion of the witness.

(Testimony of J. E. O'Connell.)

The COURT. It is a question on which you may enter fully on cross examination. It is overruled.

A. No, sir, prior to December 31st, 1920, the plaintiff corporation engaged in the Restaurant and Bakery Business in Helena, the restaurant was known as Eddy Restaurant, the Bakery was known as Eddy Steam Bakery here on Edwards Street.

Mr. E. H. Gallivan conducted the restaurant business during the year 1921. J. E. O'Connell conducted that bakery business during the year 1921. That is myself.

Mr. WEIR. You may take the witness.

The COURT. Cross examine.

Cross Examination by Mr. WHEELER.

I have lived in Helena 22 years and during all that time have been engaged in the bakery business since 1916. I went into partnership with Mr. Gallivan in 1910; we were in the Cafe business from 1910 to 1916, and in 1916 went into the bakery business also. In 1920, part of the year I was in the cafe and bakery business, both, for nine months in the cafe and bakery business; for three months only in the bakery business. The last three months of 1920, I was in the bakery business and was not in the restaurant business at that time. What happened was that Mr. Gallivan purchased the restaurant business; the restaurant. I sold to Mr. Gallivan, out of the Gallivan and O'Connell Com-

(Testimony of J. E. O'Connell.)

pany, and I continued to run the O'Connell and Gallivan Company for the rest of the year as a corporation in 1920. In 1921 I operated the Eddy Bakery as an individual by transfer of the assets of the Eddy Bakery, of the O'Connell and Gallivan Company to me as an individual, which was consummated by the act of the Board of Directors. A record was kept of the action of the Board of Directors. I have that record, a Minute Book. You may see it. (Book handed to Counsel by Mr. Weir.)

When this transfer was put through, I did not pay any money to the corporation. I own all the stock in the corporation. [23]

Q. Was any of the stock returned to the corporation?

A. I presume that it was.

Q. Do you know whether it was or not?

A. Well; it wouldn't matter whether it was returned or not.

Q. Will you answer the question, please?

A. Do I know? No, I don't know. In 1922 when the corporation repurchased this, I returned the assets to the corporation.

Q. And did you have your stock then?

A. I presume the stock was in the same condition it had been in in 1921.

Q. Has the stock ever been transferred to you since 1922?

A. I don't quite get your question. I do not hold the stock at this time. I let it go in 1928. I owned it up until 1928.

(Testimony of J. E. O'Connell.)

Q. Now, the corporation was alleged to have repurchased all those assets in January, 1922?

A. Yes, sir.

Q. Did the corporation owe you any money for the assets when it took them back?

A. No, sir.

Q. The sole purpose of this transfer as I take it from the record, was to lower the taxes of the corporation. Isn't that true?

A. To run the business at a lower cost.

Q. Yes. And it is a fact the taxes would be reduced because of the excess produced by the taxes of 1921?

A. Yes, sir.

Q. Well; it is a fact that you did want to get away from the higher taxes? Isn't it?

A. Why, certainly.

Q. And that was the purpose of the transfer, wasn't it?

A. That was the principal reason.

Mr. WHEELER. That's all.

Redirect Examination by Mr. WEIR.

Q. You stated that the restaurant was sold to Mr. Gallivan. Was it sold to Mr. Gallivan directly by the corporation, or did it go to someone else before Mr. Gallivan?

A. The restaurant was transferred to me and I sold it to Gallivan.

Q. That is, O'Connell and Gallivan Company transferred to you?

(Testimony of J. E. O'Connell.)

A. Yes, sir.

Q. Now, Minutes have been referred to here as the record of [24] these transfers. I ask you if you can identify this book which I hand you as the Minute Book of the O'Connell and Gallivan Company; pages 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25?

A. Yes, sir.

Mr. WEIR. We will offer those minutes.

Mr. RANKIN. No objection.

The COURT. Admitted. Go on.

Mr. WEIR. That's all. May we substitute copies of the book?

The COURT. Yes.

Witness excused.

The minutes of said corporation are in words and figures as follows: Pages 14-25 inclusive, [25]

MINUTES OF MEETING OF BOARD OF DIRECTORS OF O'CONNELL & GALLIVAN COMPANY.

A special meeting of the Board of Directors of the O'Connell & Gallivan Company, a corporation, was held at the office of the company at Helena, Montana, at 8 o'clock P. M. September 27, 1920.

There was present at said meeting directors J. E. O'Connell and J. F. O'Connell.

The meeting was called to order by director J. F. O'Connell, also vice-president of the company.

There was received and filed the resignation of director E. H. Gallivan as director of the company and as president thereof. Upon motion said resignation was accepted to take effect immediately.

Thereupon, director J. E. O'Connell moved that Eve O'Connell, a stockholder of this company be elected a director of said company, said motion was duly seconded and carried.

Thereupon by reason of a vacancy in the office of president of said company by the resignation of said E. H. Gallivan as president of said company, J. F. O'Connell nominated director J. E. O'Connell for the position of president of said company, and a vote being had said J. E. O'Connell was unanimously elected president of said company.

Thereupon, a vacancy existing in the office of secretary and treasurer of said company, director J. E. O'Connell nominated director Eve O'Connell for the position of secretary and treasurer of said company, and a vote being taken said Eve O'Connell was unanimously elected secretary and treasurer of said company.

Thereupon a discussion was had among said board about the compensation of officers of said company. Director J. F. O'Connell moved that the president of said company receive as compensation for his services in the management of said company the sum of $7,500.00 per annum, until the further

action of this board, that the vice-president receive the sum of nothing per annum for his services in the employ and service of said company, and the secretary and treasurer receive the sum of $ nothing per annum for his services in the employ and service of said company.

Thereupon director J. F. O'Connell moved that the restaurant heretofore owned and operated by this company which was and is known as the "Eddy Cafe" at Nos. 103 and 105 North Main Street, in the city of Helena, Montana, together with all and singular the furniture, fixtures, dishes, stock of foodstuffs, linens, tableware, and any and all other property of any kind, nature or character which has been and now is being used in the [26] conduct of that certain restaurant above mentioned, together with all bills owing to said company for bills run and credits extended in the operation of said restaurant business, such transfer and sale to take effect at the hour of midnight September 30th, 1920, and all receipts from said business up to that hour to belong to said company and all bills payable and expenses growing out of the management of said restaurant business to be paid by said company up to that hour, be sold to J. E. O'Connell of Helena, Montana, for the sum of $..... and the officers of this corporation execute and deliver the necessary papers to effect said sale, which motion was duly seconded, and upon a vote being taken was unanimously carried.

There being no further business before the meeting the same was adjourned.

Dated September 27, 1920.

J. E. O'CONNELL,
President.

Attest: EVE O'CONNELL,
Secretary.

WE, the undersigned, directors of the O'Connell & Gallivan Company do hereby consent to the holding of a special directors meeting, minutes of which hereinbefore appear, without notice, hereby expressly waiving any and all notice of said meeting and confirming each and all the acts and things done and performed at said special directors meeting.

Dated September 27, 1920.

J. E. O'CONNELL,
J. F. O'CONNELL,
EVE O'CONNELL,
Directors. [27]

Helena, Montana, September 27, 1920.

The Board of Directors of
O'Connell & Gallivan Company,
Helena, Montana,

Gentlemen:

Herewith I tender my resignation as president and a member of the Board of Directors of your

Company, the O'Connell & Gallivan Company, the same to take effect immediately.

Very truly yours,

ED. H. GALLIVAN.

Accepted September 27, 1920.

J. F. O'CONNELL,

J. E. O'CONNELL,

Board of Directors O'Connell & Gallivan Company. [28]

MINUTES OF MEETING OF BOARD OF DIRECTORS OF O'CONNELL & GALLIVAN COMPANY.

A special meeting of the Board of Directors of the O'Connell & Gallivan Company, a corporation, was held at the office of the Company, Helena, Montana, at 2 P. M. January 1st, 1921, pursuant to the following signed Waiver of Notice.

Helena, Montana, January 1, 1921.

We the undersigned being all of the Directors of the O'Connell & Gallivan Company, do hereby consent that a Special Meeting of the Board of Directors may be held at the Office of the Company, on January 1st, 1921, for the purpose of considering the sale of the Company's assets to Mr. J. E. O'Connell, and such other business as may come before the meeting with like force and effect, as if

due and regular notice, as required by law had been given.

J. E. O'CONNELL	748 shares
J. F. O'CONNELL	1 share
EVE O'CONNELL	1 share.

[29]

The meeting was called to order by the election of Mr. J. E. O'Connell as Chairman, Mr. J. F. O'Connell, Secretary.

Mr. J. F. O'Connell presented a proposal from Mr. J. E. O'Connell that he be allowed to purchase the assets, good will, trade name, etc., of the O'Connell & Gallivan Company, at book value as of date December 31st, 1920, and that he would assume any and all outstanding liabilities of the Company that existed at that time.

It was moved, seconded and carried that this proposal be accepted.

There being no further business before the meeting, meeting adjourned.

Dated January 1st, 1921.

J. E. O'CONNELL,
Chairman.

Attest: J. F. O'CONNELL,
Secretary. [30]

MINUTES OF THE MEETING OF THE STOCKHOLDERS OF THE O'CONNELL & GALLIVAN COMPANY.

A special meeting of the Stockholders of the O'Connell & Gallivan Company, a corporation, was held at the office of the Company, Helena, Montana, January 1st, 1921, at 3 P. M., pursuant to the following signed Waiver of Notice of meeting.

Helena, Mont. Jan. 1, 1921.

We the undersigned being all of the stockholders of the O'Connell & Gallivan Company, holding respective shares of stock set opposite our names, do hereby consent to the holding of a special meeting of the Stockholders for the purpose of considering the sale of the Company's assets to Mr. J. E. O'Connell, and such other business as may come before the meeting, and that such meeting may be held with like force and effect as if due and regular notice had been given.

J. E. O'CONNELL	748 shares
J. F. O'CONNELL	1 share
EVE O'CONNELL	1 share.

[31]

Meeting was called to order by the election of Mr. J. E. O'Connell as Chairman, Mr. J. F. O'Connell, Secretary.

Mr. J. F. O'Connell read the minutes of the meeting of the Board of Directors, held at 2 P. M. of this date.

It was moved and seconded that the action of the Board of Directors in disposing of the assets of the Corporation to Mr. J. E. O'Connell be confirmed.

There being no further business the meeting was adjourned.

J. E. O'CONNELL
Chairman

J. F. O'CONNELL
Secretary. [32]

MINUTES OF MEETING OF BOARD OF DIRECTORS OF O'CONNELL & GALLIVAN COMPANY

A Special Meeting of the Board of Directors of the O'Connell & Gallivan Company, was held at the office of the Company, at Helena, Montana at 2 P. M., January 2nd, 1922, pursuant to the following signed waiver of Notice.

Helena, Mont. Jan. 2, 1922.

We, the undersigned being all of the Directors of the O'Connell & Gallivan Company, do hereby consent that a Special Meeting of the Board of Directors may be held at the Office of the Company, on January 2nd, 1922, for the purpose of considering the purchase of the Assets of the Bakery owned and operated by J. E. O'Connell, and such other business as may come before the meeting, with like

force and effect, as if due and regular notice as required by law had been given.

J. E. O'CONNELL
J. F. O'CONNELL
EVE O'CONNELL. [33]

The meeting was called to order by the election of Mr. J. E. O'Connell as Chairman, and Mr. J. F. O'Connell as Secretary.

Mr. J. F. O'Connell presented a proposal from J. E. O'Connell in which Mr. J. E. O'Connell proposes to sell the Assets, Good Will, Trade Name, Etc., of the Bakery, operated by him, under the trade name of Eddy's Steam Bakery, at the book value as shown by his books, as of date Dec. 31, 1921, and that the Company should assume any and all outstanding liabilities of the said Bakery that existed at that time. Mr. O'Connell states that the total assets were $55,564.99, and that the liabilities of the Bakery at that time were $8,537.93, leaving a net worth of $47,027.06.

It was moved, seconded and carried that this proposal be accepted.

There being no further business before the meeting the meeting adjourned.

Dated January 2nd, 1922.

J. E. O'CONNELL
Chairman

Attest: J. F. O'CONNELL
Secretary. [34]

MINUTES OF MEETING OF THE STOCKHOLDERS OF THE O'CONNELL & GALLIVAN CO.

A Special meeting of the Stockholders of the O'Connell & Gallivan Company, was held at the Office of the Company, at Helena, Montana, at 3 P. M. January 2nd, 1922, pursuant to the following signed Waiver of Notice.

Helena, Mont. Jan. 2, 1922

We, the undersigned being all of the Stockholders of the O'Connell & Gallivan Company, do hereby consent that a Special Meeting of the Stockholders may be held at the Office of the Company, on January 2nd, 1922, for the purpose of considering the purchase of the Assets of the Bakery, owned and operated by J. E. O'Connell, and such other business as may come before the meeting, with like force and effect, as if due and regular notice as required by law had been given.

J. E. O'CONNELL	748 Shares
J. F. O'CONNELL	1 Share
EVE O'CONNELL	1 Share. [35]

The meeting was called to order by the election of Mr. J. E. O'Connell as Chairman and Mr. J. F. O'Connell as Secretary.

Mr. J. F. O'Connell read the minutes of the meeting of the Board of Directors, held at 2 P. M. of this date.

It was moved, seconded and carried, that the action of the Board of Directors in purchasing the

Assets of the Bakery, operated by J. E. O'Connell, under the trade name of Eddy's Steam Bakery, at the book value as of date Dec. 31, 1921 be confirmed.

There being no further business the meeting was adjourned.

J. E. O'CONNELL
Chairman

Attest:

J. F. O'CONNELL
Secretary. [36]

HUGH D. GALUSHA, being called as a witness on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination by Mr. WEIR.

My name is Hugh D. Galusha. I have lived in Helena, Montana, since 1914. My business is Certified Public Accountant. I am acquainted with the stock of this corporation, this plaintiff corporation. I know about the minutes and the meetings referred to in the minute book here on pages 18, 19, 20 and 21, those minutes were carried, written up and entered on that date.

Mr. WEIR. That is all.

Cross Examination by Mr. RANKIN.

Q. You were present there and got him to suspend this, with the plan of reducing the taxes, and you told Mr. Atwater that?

(Testimony of Hugh D. Galusha.)

A. Yes, I did.

Q. That is, you directed all the transfer made to Mr. O'Connell for the purpose of lowering the taxes?

A. Mr. O'Connell asked me what the rates were as an individual and what the rates were as a corporation.

Q. But the whole idea, in making this transfer, you had in mind making the transfer to lower the taxes?

A. I told him when he asked me, it would be a lot cheaper as an individual.

Q. To reduce the taxes?

A. Yes, sir.

Q. Did you explain it to Mr. Atwater?

A. Yes, sir.

Q. There was nothing of a money transaction, the company *company* or the individual have to pay anything?

A. No, sir.

Q. That was simply a paper transaction, I mean not an actual transfer, but a paper transaction?

A. Yes, I recall the circumstances; the stock was turned over to the corporation as security for the debt.

Q. The stock was turned over as security for the debt? [37]

A. Yes, sir.

Q. It was put up as security?

A. Yes, sir.

Q. For that, at that time?

(Testimony of Hugh D. Galusha.)

A. Yes, sir.

Q. But the debt was never paid.

A. The debt was carried on the stock ledger.

Q. Is there any record of that in the minutes?

A. Page 23 is the meeting approving the transfer, yes, 22 and 23.

Q. What was the date of this transfer?

A. It would be around about this date I presume.

Q. Is that on the date the property was sold, 1921?

A. When it was first made out.

Q. When was the first item of stock or anything else of the assets ever sold by Mr. O'Connell.

A. January, 1921.

Q. So far as the records show, what was paid for the assets, by Mr. O'Connell?

A. The record doesn't show.

Q. Doesn't show anything?

A. No.

Q. As a matter of fact, what was given?

A. The accounts receivable and the notes?

Q. A promissory note?

A. No, sir.

Q. What was it?

A. An open account.

Q. Interest or not?

A. Not any.

Q. Does the record show what was sold, the profits, or income?

(Testimony of Hugh D. Galusha.)

A. The records show the profits.

Q. What was that?

A. It says at book value December 31, 1920.

Q. What was the book value?

A. The record as shown by O'Connell and Gallivan Company December 31, 1920. [38]

Q. The valuation was ascertained?

A. Yes, sir.

Q. The record of that is not here. The record shows it was just transferred, not cancelled?

A. At the close of 1921?

Q. Yes.

A. Yes, sir.

Q. The assets were never distributed to the stockholders no distribution made to the stockholders for the sale of this property to O'Connell, the corporate sale of assets to O'Connell?

A. Yes, sir, he was the only stockholder.

Q. He can't be the only stockholder.

A. Two qualifying stockholders.

Q. All right. Anything done with this property, anything distributed to the stockholders?

A. Which property do you mean?

Q. Anything given to the stockholders, any dissolution?

A. No, sir.

Q. What became of the company, did it proceed or not?

A. Yes, sir.

(Testimony of Hugh D. Galusha.)

Q. Did you find later that the assets of both the O'Connell-Gallivan Company, both O'Connell and the company were transferred?

A. Yes, sir.

Q. And this business has a member accountant?

A. Yes, sir.

Q. A certified public accountant?

A. Yes, sir.

Q. For how many years had you been accountant of this corporation, in all, altogether how many years?

A. Probably since 1918 or 1919.

Q. And you had also looked after the personal accounts, money, and the money for the income taxes for both the company and the individual?

A. Yes, sir. [39]

Q. Was there a bill of sale of the personal property?

A. Nothing I know of.

Q. Any real estate transferred?

A. The corporation didn't own any real estate.

Q. Didn't own any at all?

A. No, sir.

Q. No deeds given by the corporation to Eddy O'Connell?

A. I can explain that if you wish.

Q. All right.

A. The building in which this business is conducted had been purchased from Stadler and Kaufman, under a contract of sale; that contract of sale

(Testimony of Hugh D. Galusha.)

was to J. E. O'Connell personally and had always been so.

Q. Would you say the corporation included this real estate in this company's assets on this date, December 31, 1921?

A. Yes, although they didn't have the legal title.

Q. Well, wasn't that in the total assets, one was the real estate, the building of the company but carried in Eddy O'Connell's name?

A. That I am not qualified to say.

Q. Well, you prepared this statement?

A. I prepared this statement; we got that over there.

Q. All right. You show real estate of the company on December, 31——

The COURT. What did you say?

Q. December 31. That balance sheet was made by you for the Eddy Bakery?

The COURT. A Tax statement?

Mr. RANKIN. No, a sheet. You put the valuation at $15,192.94?

A. Yes.

Q. Was that building in here?

A. Yes, sir.

Q. And no deed or transfer, any kind of transfer to Eddy O'Connell was that made from the Steam Bakery to Eddy O'Connell? [40]

A. I think they were, yes, sir.

(Testimony of Hugh D. Galusha.)

Q. Any written evidence of any transfer from the Eddy Steam Bakery of this building, to Eddy O'Connell personally?

A. Nothing I know of. Not to my recollection; nothing. There was the contract from Stadler and Kaufman to J. E. O'Connell.

Q. And J. E. O'Connell was holding that for the plaintiff?

Mr. WEIR. Just a moment. To which we object as calling for a conclusion of law.

Q. What is that—that the company owned the building, the corporation?

Mr. WEIR. Just a moment, the witness hasn't stated the company owned the building.

The COURT. Yes.

Q. The company owned the actual title of the building; it belonged to the company on that day it was transferred to O'Connell personally, December 31, 1921, didn't it; to the Eddy Steam Bakery, not to him personally, even though carried in his name?

A. I presume so.

Q. And I will ask you if that—everything in that building was all of the value of $50,000.00?

A. Yes, I should think so.

Q. Do you remember the purchase price?

A. No.

Q. How about the value put on the land and the interest?

(Testimony of Hugh D. Galusha.)

A. $16,494.00.

Q. How much was due to the owners of the real estate to make the legal title?

A. This title to the building? $4,000.00.

Q. Is that from the balance due on the building?

A. Yes, sir.

Q. Now, that statement of December 31, 1920, is to the same effect as to the land on that date; the building $15,313.70. In other words, that same condition obtained December 31, with the exception of the full deed?

A. Yes, sir.

Q. That is all.

The COURT. Any redirect? [41]

Redirect Examination by Mr. WEIR.

Q. Mr. Galusha, you have referred to a formal contract between Stadler and Kaufman and J. E. O'Connell. I show you a document dated May 7, 1923, and ask you if that is the document.

A. The document I have in mind was the contract of purchase.

Q. I show you another document dated April 25, 1917, and ask you if that is the document to which you refer.

A. Yes, sir.

Q. Can I have the reporter mark it for identification?

(Exhibits were here marked defendant's two and three.)

(Testimony of Hugh D. Galusha.)

Q. The reporter having marked the deed exhibit 3, I will ask you if that deed is the deed testified to from the exhibit one?

A. Yes, sir.

Mr. WEIR. We offer first the contract, Exhibit 2 and then the deed, exhibit 3.

Mr. RANKIN. No objection.

The COURT. What are those exhibits.

Mr. WEIR. They are the contracts in writing for the purchase of this building. This is the deed.

The COURT. Call the next witness.

Mr. WEIR. The plaintiff rests.

Thereupon, the defendant moved for judgment in its favor and against the plaintiff upon the ground that the evidence was insufficient to support judgment for the plaintiff, Motion denied by the Court and exception of the defendant noted.

The COURT. For the defendant.

A. B. ATWATER, being called as a witness for and on behalf of the defendant was duly sworn and testified as follows:

Direct Examination by Mr. RANKIN.

My name is A. B. Atwater. I am Internal Revenue Collector. I have been such 15 years, and am still such. I checked up this income and made an income tax adjustment.

(Testimony of A. B. Atwater.)

Q. You talked with O'Connell and Galusha?

A. To some extent.

Q. At the time he made this transfer to lower the income taxes? [42]

A. I talked to Galusha in 1920.

Q. You know what place was valued at, to make a fair basis?

Mr. WEIR. Just a moment, if that is to impeach our witness, we want to know when and where.

The COURT. Well, let me see. What is this public accountant's name?

Mr. WEIR. Galusha.

The COURT. Oh, yes. Well, evidently, as far as O'Connell is concerned, it may be proper. Another time this is stated in the contract; it is simply what he offered to pay.

Q. Did you ever talk to O'Connell about that?

A. I talked to O'Connell about his taxes, yes; I was making an investigation.

(Exhibit marked for identification Defendant's Exhibit 4)

Mr. RANKIN. We offer in evidence defendant's exhibit 4 and ask you what that is briefly, if that is the claim for refund?

A. That is the tax claim for refund: yes, sir. It is a certified copy.

Mr. RANKIN. A photostatic copy.

Mr. WEIR. That is the same claim filed in the complaint?

(Testimony of A. B. Atwater.)

Mr. WHEELER. It was filed in 1929.

Mr. WEIR. May I ask: Do you know whether that is the same claim filed with the complaint?

Mr. WHEELER. Yes.

Mr. WEIR. If it is the same as filed with the complaint, it is in evidence.

Mr. RANKIN. It is not in evidence because of the filing of the complaint.

Q. (Mr. Rankin) I will ask you whether or not Mr. Galusha appeared as attorney in fact, with a power of attorney?

Mr. WEIR. Just a moment. The document speaks for itself, without the interpretation of the witness.

The COURT. State the facts and we won't make a point on it right now.

Q. I just wanted to call the court's attention to it.

(Exhibits marked for identification Defendant's exhibits five to ten). [43]

Q. I show you this exhibit five. What is it; whose income tax return is that?

A. That is the individual income tax return of J. E. O'Connell, for 1920.

Mr. RANKIN. We offer in evidence the photostatic copy.

The COURT. What is the purpose?

Mr. RANKIN. Well, to show the claims of the corporation and the individual; and the real estate of the corporation, no transfer; to show that the

(Testimony of A. B. Atwater.)

income tax returns of both the individual and the company and to show it is actually of the company.

Mr. WEIR. If the court please, we object to defendant's exhibit five upon the ground that it is not material, but relates to another matter. This is J. E. O'Connell's return for 1920.

The COURT. It seems very material for the defendant. Overruled.

Exhibit No. 5 is the individual income tax return for 1920 filed by J. E. O'Connell, Helena, Montana, which shows income of J. E. O'Connell as manager O'Connell & Gallivan Co., Helena, $7500.

Q. Defendant's exhibit 6 is the individual income tax return for who?

A. J. E. O'Connell for 1921.

Mr. RANKIN. We offer it in evidence.

Mr. WEIR. That is the year in question.

The COURT. All those things are admitted. I can't see any necessity for all this.

Exhibit 6 is the individual income tax return for 1921 filed by J. E. O'Connell, Helena, Montana by this reference made a part thereof.

Mr. WEIR. No objection to exhibit six.

Q. Defendant's exhibit seven; what is it, briefly?

A. J. E. O'Connell's individual return for 1922.

Mr. RANKIN. We offer it in evidence.

Mr. WEIR. The same objection as offered to defendant's exhibit five.

The COURT. What is the reason for it; to show he didn't pay taxes on the bakery? [44]

(Testimony of A. B. Atwater.)

Mr. RANKIN. Well, it is to show the corporate transfer; that, as a matter of fact, this was of the company and not the individual; the individual was not benefited by the transfer.

The COURT. It is admitted that the company transferred to him in 1921 and back to the company in 1922. Well, I think it is material to the stock record. The objection will be overruled.

Exhibit No. 7 is the individual income tax return for 1922 filed by J. E. O'Connell, Helena, Montana, showing salary received from O'Connell & Gallivan Co., Helena, Montana, $7500.

Mr. WEIR. Exception.

Q. Exhibit eight?

A. The O'Connell-Gallivan corporation return for 1920.

Mr. RANKIN. We offer it in evidence.

Mr. WEIR. If the court please, there is a batch of letters here.

Mr. RANKIN. We have no desire to put the letters in.

Mr. WHEELER. This is just as the return is received in the office.

Mr. WEIR. The plaintiff objects to defendant's offered exhibit, Number eight, on the ground that it is irrelevant to any issue in the case. It is apparently the income tax return for the O'Connell-Gallivan Company for the year 1920.

The COURT. It is proof of the income in the record. Likewise overruled.

(Testimony of A. B. Atwater.)

Exhibit 8 is the Corporation Income and Profits tax return for 1920 filed by O'Connell-Gallivan Company, Incorporated, Helena, Montana, by this reference made a part hereof.

Mr. WEIR. Exception.

Q. Defendant's exhibit 9; do you know, state briefly whether this is the income tax return for 1921 for the O'Connell-Gallivan Company?

A. The O'Connell-Gallivan Company corporation return for the year 1921.

Mr. RANKIN. We offer it in evidence.

Mr. WEIR. No objection. [45]

The COURT. Admitted.

Exhibit 9 is the Corporation income and profits tax return for 1921, filed by O'Connell & Gallivan Company, Helena, Montana, reporting "No income or expense" by this reference made a part hereof.

Q. I show you defendant's exhibit 10 and ask you if this is the corporation return of the O'Connell-Gallivan Company for the year 1922.

A. The O'Connell-Gallivan Company corporation return for the year 1922.

Q. On internal revenue?

A. Yes.

Mr. RANKIN. We offer it in evidence.

Mr. WEIR. We object to it.

The COURT. Same ruling.

Mr. WEIR. Exception.

Exhibit 10 is the Corporation income tax return for 1922 filed by O'Connell & Gallivan Co., Helena, Montana, by this reference made a part hereof.

(Testimony of A. B. Atwater.)

Q. Now, you took this up with Mr. O'Connell over a period of some months did you, the matter of this income tax dispute?

A. Oh, no. I was in his office one time and we talked about it, thoroughly, however. I had made the investigation in a friendly way.

Q. Now, I will ask you whether anything was turned over to the company——

Mr. WEIR. Just a moment.

Q. ——Whether Mr. O'Connell told you of anything that was turned over to the company for the assets that were turned over by the company to Mr. O'Connell.

A. I will have to explain.

Q. All right explain briefly.

A. I told Mr. O'Connell that in my opinion that the stock should have been transferred to the company in payment for the assets.

Mr. WEIR. Just a moment; what assets.

A. The assets of the Eddy Bakery. [46]

Q. One moment. I don't want to get involved. I want to ask you whether Mr. O'Connell made any statement to you as to whether or not anything was turned over to the company by him for the assets that he claimed were transferred to him personally by the company.

A. Well, he admitted that he was—I wanted to——

Q. I know. All I want to know about; I want to know what he said.

(Testimony of A. B. Atwater.)

A. Well, he said he didn't believe the case should be lost because of the fact that the stock had not been transferred.

Q. Let me ask you if he said he transferred anything to the company for the assets turned over to him?

A. No, I don't know whether he did or not.

Q. Did you ask him?

A. No, it was a friendly conversation.

Q. Do you know then, whether he transferred anything; did you ever ask him about it?

A. No. As I understand, there never was any transfer.

Q. Did he admit to you there wasn't any transfer.

A. He admitted in that talk there wasn't any deed or transfer.

Q. Did you ask him whether there was any deed or bill of sale or anything of that kind of the property of the company to him?

A. I don't recall him saying anything like that.

Q. As far as you could ascertain from talking to him in the office of the company, there wasn't any transfer?

A. As I understood, there wasn't any transfer or bill of sale.

Q. From the talk with him?

A. Yes, sir, and I embodied that in my reports.

Mr. RANKIN. That's all.

(Testimony of A. B. Atwater.)

Cross Examination by Mr. WEIR.

Q. Mr. Atwater, you spoke of transfers. You say Mr. O'Connell admitted that there was no transfer—transfer of what?

A. Of the capital stock that he owned in the corporation, the Eddy Gallivan Company, a corporation, the capital stock of the corporation which he owned. [47]

Q. You don't mean to say, as I understand you, that Mr. O'Connell admitted that there wasn't any transfer of the assets of this corporation, did you?

A. No, not to him, but he admitted there was no transfer of the capital stock by him to the corporation in payment of the transfer.

Q. You say there was nothing to show what were transferred; there was a transfer of the certificates of the capital stock, or any assets of the corporation?

A. Yes.

Q. You refer to assets of the Eddy Bakery. Was there any difference in the status of the bakery and the restaurant?

A. The Eddy Bakery and the Eddy Cafe or Restaurant all belonged to the corporation; they were all a part of the assets of the corporation in 1921.

Q. Did you include the Cafe business in the taxes of 1921?

A. No.

Q. Why?

(Testimony of A. B. Atwater.)

A. Because the cafe had been sold to E. H. Gallivan.

Q. And the sale—was there any bill of sale?

A. No, but he surrendered all his stock.

Q. Was there any bill of sale?

A. I don't know.

Q. Was there any deed?

A. I don't know.

Q. I show you what purports to be the stock book of the O'Connell Gallivan Company, with reference to the Stock of Gallivan. That was the certificate upon which you base your statement.

A. Well, there is one certificate, No. 5, to E. H. Gallivan for 249 shares; and then earlier, there was one share of the stock which is attached to the stub.

Q. The entry is in the book I show you, E. H. Gallivan?

A. Yes, September 27.

Q. September 27, 1920. Isn't that the same status, the status of the rest of the stock that Mr. O'Connell owned, so far as the book is concerned?

A. What stock do you refer to?

Q. All in the name of J. E. O'Connell and J. F. O'Connell. [48]

A. No. 1 is in the name of J. E. O'Connell, but it hasn't any endorsement on it.

Q. Pasted in the book?

A. Yes, pasted in the book but hasn't any endorsement on it. No. 2 is E. H. Gallivan for one

(Testimony of A. B. Atwater.)

share and this has the endorsement on the back dated September 27, 1920.

Q. Now—there wasn't—that is, so far as you know, anything you were able to discover wouldn't make any difference in the status of the Gallivan stock and the O'Connell stock was there, or was there?

Mr. RANKIN. It is immaterial.

The COURT. I think that is correct; objection sustained.

Mr. WEIR. Exception.

Q. Mr. Atwater, so far as you know, was there any difference in the status of the assets of the bakery and the restaurant, so far as their being concerned, *being concerned,* being taxable in this corporation?

Mr. RANKIN. Object to it on the ground it is immaterial.

The COURT. Objection sustained.

Mr. WEIR. Exception.

The COURT. Anything further with the witness?

Q. Mr. Atwater, you have had access to this stock book right from the beginning of your cross examination, have you?

A. Yes, sir.

Redirect Examination by Mr. RANKIN.

Q. Was there any dissolution of the company?

Mr. WEIR. Just a moment, that isn't proper.

(Testimony of A. B. Atwater.)

Mr. RANKIN. You asked him if there was any dissolution of the company, any transfer of the stock.

The COURT. That is already testified to by a prior witness who is still president of the company.

Mr. RANKIN. That is all. The government rests.

Mr. WEIR. If the court please, there is one question. I should have asked Mr. O'Connell on direct. May I call him back?

Mr. RANKIN. No objection.

The COURT. Very well. [49]

J. E. O'CONNELL, Recalled.

By Mr. WEIR:

Q. Was there any change in the method of doing business so far as changing the billing to the public was concerned in 1921 or 1920?

A. Yes, sir.

Q. How as to your billheads?

A. My billheads carried the name of J. E. O'Connell.

Q. When.

A. January of 1921.

Q. And all during the year 1921?

A. And all during the year 1921.

Q. What was there? J. E. O'Connell, I think it was?

(Testimony of J. E. O'Connell.)

A. Yes.

Q. And how, prior to 1921—1920?

A. O'Connell and Gallivan, incorporated.

Q. Was it on the billheads?

A. Yes, sir.

Q. How about your contracts?

A. Purchases were made in the name of J. E. O'Connell; our taxes were paid in the name of J. E. O'Connell.

Q. That is in 1921?

A. In 1921. The Public was advised by me of the change—the only thing we knew how to do to inform the people because of the sale; that we were operating as an individual.

Q. And this J. F. O'Connell referred to here?

A. Is my brother.

Q. And Eve O'Connell?

A. My wife.

Cross Examination by Mr. RANKIN.

Q. The purpose of it was to show Eddy Gallivan was out, was it?

A. No, sir.

Q. Had nothing to do with it?

A. No, sir.

Q. I just understand you to say you did everything you could to show the public he was not in it. [50]

A. Not that he wasn't in on it; I didn't say that.

Q. What did you say?

A. I said I was operating as an individual.

(Testimony of J. E. O'Connell.)

Q. Did you want to show the public Eddy Gallivan wasn't in it any more?

A. I think the public, everybody knew it.

Q. Didn't you sign Eddy Steam Bakery, and just your name under it?

A. Our business always operated under the trade name of Eddy Bakery.

Q. You put Eddy Steam Bakery on it?

A. If we rendered a bill we wouldn't render it J. E. O'Connell because of purchases made in the trade name. We operated for years under the name of Eddy Steam Bakery or Eddy Cafe. If I sent a bill out on the first of January, J. E. O'Connell, some people wouldn't know from whom they purchased. It was to show them the ownership.

(Exhibits 11 and 12 marked for the defendant)

Q. I show you proposed exhibits 11 and 12. Exhibit No. 11 refers to the J. E. O'Connell under the Eddy Steam Bakery.

A. Under the Eddy Steam Bakery. I would say those billheads were used in 1921.

Q. And Exhibit 12 is billheads used in 1921?

A. Yes, sir.

Mr. RANKIN. We offer these billheads in evidence. No objection, I take it?

Mr. WEIR. No objection.

Q. When did you have the Eddy Gallivan sale?

A. September 1920.

Q. Any difference in the way you conducted this business during the years?

A. No, sir.

(Testimony of J. E. O'Connell.)

Q. The business went on just the same except in the way you conducted it in the name of a corporation or individual?

A. We tried to do it, yes. [51]

Q. You were manager at all times for the company and as an individual?

A. Mr. Gallivan was President up to 1920.

Q. But didn't you, as a matter of fact, manage the bakery, and he the restaurant?

A. Yes.

Q. You have always been manager of the bakery?

A. Yes.

Q. There is no change in that?

A. No, sir.

The COURT. Anything further?

Mr. RANKIN. Nothing further.

Redirect Examination by Mr. WEIR.

Q. Mr. O'Connell, when did the restaurant go out of this company?

A. September 1920.

Q. And how did it go out, by what method?

A. By resolution of the Board of Directors selling the assets of the Eddy Cafe to me and by me paying a bonus to Mr. Gallivan for his stock in the O'Connell Gallivan Company.

Q. Was there any dissolution, or anything?

A. No, sir.

Q. In other words, wasn't the restaurant handled just as the bakery?

A. Yes, sir.

Mr. RANKIN. One moment——

Mr. WEIR. That's all.

(Testimony of J. E. O'Connell.)

Recross Examination by Mr. RANKIN.

Q. But this transfer had nothing to do with Eddy Gallivan; this was a separate and distinct transaction? In other words this had nothing to do with the bakery?

A. No.

Witness excused. [52]

Exhibit 11 follows:

In Account with
EDDY'S STEAM BAKERY
J. E. O'CONNELL
Phone 658

18 Edwards Street Helena, Montana.....192.....

Date	Articles
	To Balance
	To Merchandise

Exhibit 12 follows:

In Account with
EDDY'S STEAM BAKERY
O'Connell & Gallivan Co., Inc.

18 Edwards Street Phone 658
Helena, Montana.....192.....

All bills are due weekly.

Date Food Administrators License No. B 16111

Articles To Balance
To Merchandise.

That thereupon, the said cause was submitted to the Court for decision.

That, thereafter, briefs were submitted to the Court, and on February 5, 1931, the Court entered its decision herein ordering judgment in favor of the Plaintiff and against the defendant in words and figures as follows, to-wit:

(Title of Court and Cause.)

DECISION

Plaintiff sues the Collector to recover Federal income taxes exacted.

The evidence is that January 1, 1921, O'Connell & Gallivan, a Corporation, then and for some time had owned and operated Eddy's Steam Bakery. O'Connell owned all the stock save qualifying shares. Income taxes greater upon corporations than upon individuals, O'Connell and his "attorney" Galusha, in the words of a noted character of the day, "skum a skeme", the bakery to be transferred to and operated by O'Connell. Accordingly, the day last aforesaid [53] a special meeting of the corporate directors accepted O'Connell's proposal to buy all corporate assets, including trade name and good will, at book value, and a like meeting of all stockholders confirmed the transaction. There were no documents of transfer, no money paid, no note executed, no transfer of stock, though Galusha testifies the stock was pledged to the corporation to secure the debt but of which O'Connell professes ignorance and is no record.

O'Connell testifies that during 1921 he individually operated the bakery as before he had for the corporation, but bill heads were changed by substituting his name for O'Connell & Gallivan beneath the trade name "Eddy's Steam Bakery, purchases were made in his name and taxes likewise paid, the corporation transacted no business, was entitled to no profits and received none, and that the chief purpose was to "get away from the higher taxes". For 1921 the corporation made return it was inactive, without income or expense, and O'Connell in his return included the operations of the bakery. The result was to diminish taxes some $2000.00.

The Revenue Act of 1921 diminished the spread between corporation and individual taxes, and January 2, 1922 the corporate directors accepted another proposal from O'Connell that it repurchase the assets aforesaid at book value. Again, were no documents, no money paid, and O'Connell "presumes the stock was in the same condition as in 1921"; but Galusha testifies the debt was cancelled and the stock returned, though again, no record thereof. Thereafter, the corporation operated the bakery and in 1923 substituted the latter's name for its own. In 1926 the Commissioner assessed against the corporation some $3000.00 income taxes for 1921, which the corporation paid, and this action followed.

Taxes, revenues are the life-blood of states, without which they perish. Reasonable, equal and for legitimate objects of government, they are an obligation comparatively light and in the main more or less cheerfully paid.

Unhappily, however, legislatures, controlling revenues and public funds, are the persistently hunted prey of greedy and unscrupulous blocs who clamor (1) for questionable appropriations of public money for a great variety of quasi doles and state [54] socialistic schemes pauperizing the spirit, and (2) for relief from taxes by shift of the burden to others. "Where the carcass is are the vultures gathered together", and there too does the "tax expert", magician, witch doctor or hexer find good hunting in a fertile field.

Too often legislators over amiable or sensitive to the source and precariousness of official tenure, and spending other people's money or taxing other's property, ignore the pole star of Constitutions that all taxation shall be reasonable, equal and for public purposes, and fall easy victims to these tireless lobbies. The inevitable result is irregular and wasteful appropriations, unreasonable and unequal taxation, intolerable burdens threatening the very existence of private property and government, taxes too often sullenly paid only when they can not be evaded. Hence, though evasion of taxes is a fraud upon Society, the prevalent moral code little frowns upon it and attaches slight if any turpitude thereto. It is of course true that an owner lawfully may and many do abandon or sell property to escape taxes. To be lawful, however, the sale must be real and not sham, permanent and not temporary, in good faith to transfer the property and not merely to

pass title to evade taxes, that accomplished, title to be restored. Substance and not form, intent and not declarations give color to and determine the character of the transaction when in issue. The law looks quite through all camouflage to discover what lies behind.

See Shotwell vs. Moore, 129 U. S. 596;
37 Cyc. 770 and cases.

With these principles in mind, it is obvious that the transaction between the corporation and O'Connell was fictitious in so far as transfer of the former's assets to the latter is concerned, and had it been to defeat taxes upon the property itself, would have been illegal and ineffective. But that is not this case; not taxes upon *property* but taxes upon *persons* based on *income* alone are involved.

If the corporation had no income, the law imposed no taxes, however much property it owned; and that, whether lack of income was due to poor management, poor business, poor patronage or no collections, or inaction or suspension of business. Moreover, no taxes even though the corporation improvidently gave to another the right to operate its instrumentalities, conduct the business, and take and enjoy the profits.

That is the instant case. Fictitious though the transaction was, it would prevail against all save corporate creditors. [55]

To avoid corporate taxes, the intent of the scheme was to directly vest in O'Connell the income which

otherwise would directly vest in the corporation and indirectly in O'Connell as sole stockholder, if any dividends.

The corporation relieved of all labor and responsibility to perpetuate the business, trade name and good will, was likewise of income. O'Connell assumed the first, to secure the last.

Although the intent of the transaction was a sham transfer of title to the property, it was also to really vest O'Connell with all income accruing from his use of the property, thereafter both intents equally executed. The case is as simple as that of John Jones who that year permitted his son Sam to farm his father's land and take the profits. However large the latter, clearly no taxes were due from John. With that case, this is all-fours, even though confused by a disingenuous scheme.

The corporation thus having no income in 1921, the taxes assessed were illegal, and plaintiff is entitled to recover as it prays. Judgment accordingly.

February 5, 1931.

BOURQUIN,
Judge.

THAT THEREAFTER, on February 9, 1931, the Court ordered that said defendant be given 30 days in all within which to prepare and serve his proposed bill of exceptions herein.

And now within the time allowed by law and the Order of the Court the defendant lodges the fore-

going proposed bill of exceptions and asks that the same be signed, settled and allowed.

WELLINGTON D. RANKIN,
United States Attorney,
ARTHUR P. ACHER,
Assistant U. S. Attorney,
Attorneys for Defendant.

Service of foregoing bill of exceptions and receipt of copy admitted this 7th day of March, 1931.

Proposed Bill lodged March 7, 1931. [56]

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.

It is hereby stipulated and agreed between the parties hereto that the foregoing may be signed, settled and allowed as and for a bill of exceptions herein.

Dated this 2nd day of June, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.
ARTHUR P. ACHER,
Assistant U. S. Attorney,
Attorney for Defendant.

CERTIFICATE OF JUDGE.

I, George M. Bourquin, Judge of the above entitled Court, and the Judge before whom said cause was tried, hereby certify that the foregoing is a true and correct bill of exceptions, and that the same contains all the testimony given at the trial of said cause and that the foregoing is now by me hereby settled, allowed and approved as a true bill of exceptions in said cause.

Dated this 16th day of June, 1931.

BOURQUIN,
Judge.

[Endorsed]: Filed June 16, 1931.

THEREAFTER, on February 11, 1931, a petition was filed herein in words and figures as follows:

(Title of Court and Cause.)

PETITION.

Come now the parties plaintiff and defendant herein, by their respective counsel, and move the Court to make special finding and certificate herein pursuant to Section 842 of Title 28 of the United States Codes, upon the question of whether or not there was probable cause for the defendant Collector herein demanding and collecting the tax complained of in the complaint, or whether or not he acted under the directions of the Secretary [57] of the Treasury or other proper officer of the Govern-

ment in committing the act and acts complained of in the complaint.

Dated February 10th, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.
ARTHUR P. ACHER,
Assistant U. S. Attorney,
Attorney for Defendant.

[Endorsed]: Filed February 11, 1931.

THEREAFTER, on February 11th, 1931, a Certificate and Special Finding was duly signed and filed herein in words and figures following:

(Title of Court and Cause.)

SPECIAL FINDING AND CERTIFICATE.

Upon application of the parties plaintiff and defendant herein, by their respective counsel, for special finding upon the question of whether or not there was probably cause for the act and acts of the defendant Collector complained of in the complaint, or whether or not the defendant Collector in performing the acts complained of in the complaint acted under the directions of the Secretary of the Treasury or other proper officer of the Government as referred to in Section 842 of Title 28 of the United States Code, the Court finds, that the defendant Collector in demanding and collecting of the

plaintiff the tax complained of in the complaint acted under the directions of the Commissioner of Internal Revenue, and that therefore there was probable cause for said act done by the Collector and complained of in the complaint.

Dated February 11th, 1931.

BOURQUIN,
Judge.

[Endorsed]. Filed February 11th, 1931. [58]

THEREAFTER, on February 11th, 1931, a Judgment was duly entered herein in words and figures as follows:

(Title of Court and Cause.)

JUDGMENT.

This cause came on for hearing on the merits on the 16th day of July, 1930, before the Honorable George M. Bourquin, pursuant to a stipulation of the parties in writing waiving a jury, under Section 773 of Title 28 of the United States Code, and legal evidence free of objection being submitted, and the cause being submitted to the Court and taken under advisement, and the Court thereafter on the 5th day of February, 1931, having made and filed herein its opinion and findings in favor of plaintiff and against defendant, and directing judgment as prayed in the complaint, and the Court having thereafter on the 11th day of February, 1931, at the request of the parties by their counsel in open

Court made herein its special finding, viz; that the defendant Collector in demanding and collecting the tax in question from the plaintiff acted under the directions of the Commissioner of Internal Revenue.

Now, Therefore, it is hereby ORDERED, ADJUDGED and DECREED, that the plaintiff do have and recover of the defendant the sum of Three Thousand Eight Hundred and Nineteen and 63/100 Dollars ($3,819.63), together with interest thereon at the rate of six per cent per annum from the 19th day of November, 1926, to a date preceding the date of payment by not more than thirty days, with costs of suit taxed at $.....

Judgment entered this 11th day of February, 1931.

C. R. GARLOW,
Clerk, U. S. District Court,
By H. H. WALKER,
Deputy. [59]

THEREAFTER, on February 14th, 1931, Notice of entry of Judgment was duly served and filed in words and figures following:

(Title of Court and Cause.)

NOTICE OF ENTRY OF JUDGMENT

To the Defendant above named, and to Wellington D. Rankin and Arthur P. Acher, his Attorneys:

You, and each of you, will please take notice that in the above entitled cause the Court on the 5th

day of February, 1931, rendered and filed herein its opinion, and that on the 11th day of February, 1931, judgment was entered herein in favor of the plaintiff and against the defendant.

Dated February 14, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.

Due personal service of within notice of entry of Judgment made and admitted and receipt of copy acknowledged this 14th day of February, 1931.

WELLINGTON D. RANKIN,
United States Attorney,
ARTHUR P. ACHER,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 14, 1931.

THEREAFTER, on May 9th, 1931, the Assignment of Errors of the defendant and appellant was duly filed herein in words and figures as follows, to-wit:

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Comes now C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana, the defendant in the above entitled cause, and files the following assignment of errors upon which he will

rely in the prosecution of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit herewith petitioned for in said cause from the [60] Judgment of the above entitled Court, entered in the above entitled Court and cause on the 11th day of February, 1931; and says that in the record and proceedings in the above-entitled cause, upon the determination thereof in the District Court of the United States for the District of Montana, there is manifest error in this, to-wit:

I.

The Court erred in concluding, deciding and ordering that the plaintiff above named, is entitled to recover, and that judgment should be entered in favor of said plaintiff and against the defendant.

II.

The Court erred in deciding that prior to December 31, 1920, the plaintiff above named granted, sold, transferred and delivered to one J. E. O'Connell of Helena, Montana, all of its property and business.

III.

The Court erred in holding and deciding that although the transfer of the property of said plaintiff on or about January 1, 1921, to J. E. O'Connell was fictitious in so far as a transfer of the former's assets to the latter was concerned, said transfer would prevail against the United States and render illegal the tax assessed by the Commissioner of Internal Revenue under the provisions of the Act of

Congress referred to as the Revenue Act of 1921 and assessed against said plaintiff as a deficiency assessment for income and excess profits taxes for the calendar year 1921.

IV.

The Court erred in holding and deciding that the plaintiff above named transacted no business in the calendar year 1921, and neither earned, received or acquired, nor was entitled to any income or profits whatsoever for or during said calendar year.

V.

That the evidence is insufficient to support the findings and conclusions of the District Court.

VI.

That the evidence is insufficient to support a finding that on or about December 31, 1920, plaintiff granted, sold, transferred or delivered to one J. E. O'Connell all its property and business. [61]

VII.

That the evidence is insufficient to support a finding that the plaintiff above named was not doing business and/or neither earned, received, acquired or was entitled to any income or profits during the calendar year 1921.

VIII.

That it affirmatively appears from the evidence herein that said plaintiff was doing business and had a taxable income during the calendar year 1921

upon which the income tax collected by the defendant herein for and on behalf of the United States, was due, legal, valid and properly collected.

WHEREFORE defendant C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana, prays that said judgment of the said District Court of the United States for the District of Montana, may be corrected and reversed, and for such other and further relief as to the Court may seem just and proper.

Dated this 9th day of May, 1931.

WELLINGTON D. RANKIN,
United States Attorney,
ARTHUR P. ACHER,
HOWARD A. JOHNSON,
Assistant United States Attorneys,
Attorneys for Defendant.

Personal service of foregoing Assignment of Errors, admitted and receipt of copy acknowledged this 9th day of May, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.

[Endorsed]: Filed May 9, 1931.

THEREAFTER, on May 9th, 1931, defendant's petition for allowance of appeal was duly filed herein, in the words and figures following:

(Title of Court and Cause.)

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable, the District Court of the United States in and for the District of Montana:

Comes now C. A. Rasmusson as collecter of Internal Revenue for the [62] District of Montana, defendant above named, acting under and by direction of a department of the Government of the United States and petitions the Court for an appeal herein and respectfully represents:

That on the 5th day of February, 1931, the Court filed its written opinion herein and on February 11, 1931, the Court issued a certificate of probable cause that the defendant herein in demanding and collecting of the plaintiff the tax complained of in the complaint acted under the direction of the Commissioner of Internal Revenue of the United States, and thereafter on February 11th, 1931, a final judgment was rendered and entered herein ordering and adjudging that the plaintiff herein do have and recover of and from the defendant the sum of $3,819.63, together with interest thereon at the rate of six per cent per annum from November 19, 1926:

That said defendant conceiving himself aggrieved by said judgment aforesaid, respectfully represents that certain errors were committed in the said judgment and proceedings had prior thereto, to the prejudice of said defendant, all of which more fully appears from the assignment of errors, which is filed herewith;

WHEREFORE, said defendant, acting under direction of a department of the Government of the United States as aforesaid, prays that an appeal be allowed to him from the District Court of the United States for the District of Montana to the United States Circuit Court of Appeals, for the Ninth Circuit and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting in the City and County of San Francisco, State of California, and that said judgment be reversed, set aside and held for naught.

Dated this 9th day of May, 1931.

WELLINGTON D. RANKIN,
United States Attorney,
ARTHUR P. ACHER,
HOWARD A. JOHNSON,
Assistant United States Attorneys,
Attorneys for the Defendant
and Appellant. [63]

[Endorsed]: Filed May 9th, 1931.

Personal service of foregoing Petition for Allowance of Appeal admitted and receipt of copy acknowledged this 9th day of May, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.

THEREAFTER, on the 9th day of May, 1931, the Prayer for Reversal was duly filed herein, in the words and figures following:

(Title of Court and Cause.)

PRAYER FOR REVERSAL.

Comes now the defendant in the above entitled action and prays that the final judgment entered herein in the District Court of the United States in and for the District of Montana, on the 11th day of February, 1931, be reversed by the United States Circuit Court of Appeals for the Ninth Circuit and that such other and further orders as may be fit and proper in the premises may be made in the above entitled cause by said Circuit Court of Appeals.

Dated this 9th day of May, 1931.

WELLINGTON D. RANKIN,
United States Attorney,
ARTHUR P. ACHER,
HOWARD A. JOHNSON,
Assistant United States Attorneys.

[Endorsed]: Filed May 9th 1931.

Personal service of foregoing Prayer of Reversal admitted and receipt of copy acknowledged, this 9th day of May, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.

THEREAFTER, on the 9th day of May, 1931, the order of the court allowing an appeal was duly filed herein, in the words and figures following:

(Title of Court and Cause.) [64]

ORDER ALLOWING APPEAL.

Upon reading and considering the foregoing petition for the allowance of an appeal, together with the assignments of error on file herein

It is hereby ordered that the appeal of C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana, from the judgment entered in the above entitled Court and cause on the 11th day of February, 1931, be and the same is hereby allowed, and it appearing that said appeal is being brought by direction of a department of the Government of the United States, the same shall operate as a supersedeas.

Dated this 9th day of May, 1931.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered May 9th, 1931.

THEREAFTER, on the 11th day of May, 1931, the citation was duly issued herein, which original citation with admission of service thereon is hereto annexed and is in the words and figures following: [65]

(Title of Court and Cause.)

CITATION ON APPEAL.

The President of the United States of America to Eddy's Steam Bakery, Inc., a corporation, Plaintiff and appellee, and T. B. Weir and Harry P. Bennett, Attorneys for said Plaintiff, Greeting:

You, and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal filed in the District Court of the United States for the District of Montana from the District Court of the United States for the District of Montana to the United States Circuit Court of Appeals for the Ninth Circuit, in a suit wherein C. A. Rasmusson as Collector of Internal Revenue for the District of Montana is defendant and appellant, and you, Eddy Steam Bakery, Inc., a corporation, are the plaintiff and appellee, to show cause, if any there be, why the judgment rendered on the 11th day of February, 1931, against said C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana, mentioned in said appeal, should not be corrected and reversed and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of Great Falls, in the District of Montana this 9th day of May, 1931.

CHARLES N. PRAY,
Judge of the District Court of the United States, District of Montana.

Personal service of foregoing Citation on Appeal, and receipt of copy thereof admitted and acknowledged this 11th day of May, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff & Appellee. [66]

[Endorsed]: Filed May 11th, 1931. [67]

THEREAFTER, on the 29th day of June, 1931, the praecipe of the defendant for transcript of record with admission of service thereon was duly filed herein, in the words and figures following:

(Title of Court and Cause.)

PRAECIPE.

To the Clerk of the above entitled Court:

You will please prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled Cause, and incorporate in such transcript of record the following papers or exhibits, to-wit:

1. The Complaint of Eddy Steam Bakery, Inc., a corporation, Plaintiff.

2. The answer of the defendant, C. A. Rasmusson, as Collector of Internal Revenue.

3. The stipulation filed herein on the 16th day of July, 1930, that a jury be waived and the case tried to the Court.

4. The Bill of exceptions duly signed, settled and allowed herein.

5. The Petition filed herein on February 11th, 1931.

6. The Special finding and certificate of Probable Cause filed herein on February 11th, 1931.

7. The Judgment of the above entitled Court rendered and entered on the 11th day of February, 1931. [68]

8. The notice of entry of Judgment dated February 14, 1931.

9. The assignment of Errors of the defendant, Petitioner and Appellant.

10. The Petition for Allowance of Appeal.

11. The Prayer for Reversal.

12. The Order allowing an appeal.

13. The Citation on Appeal with Admission of Service.

14. This Praecipe with admission of service therein.

Said transcript to be prepared and fully certified by you, as required by law, and the rules of the above entitled Court, and the rules of the United

States Circuit Court of Appeals for the Ninth Circuit.

Dated this 16th day of June, 1931.

WELLINGTON D. RANKIN,
United States Attorney,
ARTHUR P. ACHER,
Assistant United States Attorney,
Attorneys for defendant and appellant.

Service foregoing praecipe and receipt of copy admitted this 19th day of June, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff and Appellee.

[Endorsed]: Filed June 29, 1931. [69]

(Title of Court and Cause.)

Upon application of the appellant, and it appearing a proper case therefor,

It is ordered that the time for filing the transcript on appeal and docketing the above case in the Circuit Court of Appeals for the Ninth Circuit, now on appeal from the District Court of the United States for the District of Montana, be and the same is hereby extended to and including the 9th day of July, 1931.

Dated this 10th day of June, 1931.

CHARLES N. PRAY,
United States District Judge, for the District of Montana. [70]

(Title of Court and Cause.)

ORDER.

Upon application of the appellant, and it appearing a proper case therefore,

It is ordered that the time for filing the transcript on appeal and docketing the above case in the Circuit Court of Appeals for the Ninth Circuit, now on appeal from the District Court of the United States for the District of Montana, be and the same is hereby extended to and including the 27th day of July, 1931.

Dated this 7 day of July, 1931.

BOURQUIN,
United States District Judge
District of Montana. [71]

(Title of Court and Cause.)

On motion of Mr. Arthur P. Acher, Assistant U. S. Attorney, and pursuant to stipulation filed, it is ordered that original exhibits Nos. 5 to 10 inclusive, be forwarded by the clerk of this court to the clerk of the Circuit Court of Appeals at San Francisco, California, for use by said court in considering the questions raised by appeal.

Entered in open court July 2, 1931.

C. R. GARLOW,
Clerk. [72]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana.—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 72 pages, numbered consecutively from 1 to 72, inclusive, is a full, true and correct transcript of the record and proceedings in the within entitled cause, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of sixteen and 30/100 Dollars and have been made a charge against the appellant.

I further certify that there is transmitted herewith original exhibits 5 to 10 inclusive, in said cause, pursuant to the order of the court.

Witness my hand and the seal of said court at Helena, Montana, this 22nd day of July, A. D. 1931.

(Seal) C. R. GARLOW,
Clerk. [73]

[Endorsed]: No. 6537. United States Circuit Court of Appeals for the Ninth Circuit. C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana, Appellant, vs. Eddy's Steam Bakery, Inc., a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed July 25, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit.
By Frank H. Schmid,
Deputy Clerk.

No. 6537

United States Circuit Court of Appeals

For the Ninth Circuit.

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,

Appellant,

vs.

EDDY'S STEAM BAKERY, INC., a Corporation,

Appellee.

Brief of Appellant

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

WELLINGTON D. RANKIN,
United States Attorney
for the District of Montana.
ARTHUR P. ACHER,
Assistant United States Attorney.
JOHN R. WHEELER,
Special Attorney
Bureau of Internal Revenue.
Attorneys for Appellant.

Filed, ... 1931

.....Clerk.

INDEX

Page

Statement of the Case 2
Assignments of Error 5
Argument 6
The Purported Sale of the Corporation Assets to O'Connell on January 1, 1921, was Fictitious, a Sham and not a Legal Transaction 6
The Purported Transfer of the Corporate Assets to O'Connell having been Fictitious, it did not operate to divest the Appellee Corporation of the Income received from the Business in 1921 23

CASES CITED

Ames, Winthrop, 1 B. T. A. 63 13
Adlam v. McKnight, 32 Mont. 349, 353 15
Alaska Juneau Gold Mining Co. v. Ebner Gold Mining Co. (C. C. A. 9) 239 Fed. 638, 643 32
Brunton v. Commissioner of Internal Revenue (C. C. A. 9) 42 F. (2d) 81, 83 ..... 19, 26
Browne, Alexander S., 3 B. T. A. 826 27
Bishop, L. Brackett, 19 B. T. A. 1108 27
Capps Mfg. Co. v. United States (C. C. A. 5) 15 F. (2d) 528 ..... 21, 29, 30
Corliss v. Bowers, 281 U. S. 376, 378 ..... 31, 32
Cullinan v. Walker, 262 U. S. 134 13
Daily v. Marshall, 47 Mont. 377, 392 18
Eisner v. Macomber, 252 U. S. 189, 214 13
Fraser v. Nauts, (D. C. Ohio) 8 F. (2d) 106 26
Grancer v. Lareau (C. C. A. 8) 1 F. (2d) 117, 122 17
Hall, Arthur F., 17 B. T. A. 752 27

Page

International Building Co. v. Commissioner, 21 B. T. A. 617 13
Leydig v. Commissioner of Internal Revenue, (C. C. A. 10) 43 F. (2d) 494, 495.....26, 27, 30
Loud v. Hanson, 53 Mont. 445, 449..... 16
Lucas v. Earl, 281 U. S. 111, 114.....27, 28
Lucas v. North Texas Co. 281 U. S. 11, 13..... 17
Luce, Edward J., 18 B. T. A. 923..... 27
Marshall v. Franklin Fire Ins. Co. (Penn.) 35 Atl. 204 15
McKey v. Clark (C. C. A. 9) 233 Fed. 928, 933.... 16
McLures Estate, 68 Mont. 556, 566..... 15
Mitchel v. Bowers, 15 F. (2d) 287 cert. denied 47 S. Ct. 473 27
Norma Mining Co. v. MacKay (C. C. A. 9) 241 Fed. 640, 644 32
Rice-Sturtevant Automobile Co. v. Commissioner of Internal Revenue, 6 B. T. A. 793.....20, 30
Stokes v. Commissioner, 22 B. T. A. 1386..... 27
United States v. Isham, 17 Wall. 496, 506..... 26
United States v. Klausner (C. C. A. 2) 25 F. (2d) 608 14
United States v. McHatton (D. C. Mont.) 266 Fed. 602 26
Van Meter v. Commissioner, 22 B. T. A. 1202..... 30
Ward, etc. v. Commissioner, 22 B. T. A. 352..... 27
Watson v. Bonfils, (C. C. A. 8) 116 Fed. 157, 167 32
Wehe v. McLaughlin, 30 F. (2d) 217.....14, 30
Weiss v. Stearn, 265, U. S. 254.....13, 14

No. 6537

United States Circuit Court of Appeals

For the Ninth Circuit.

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,

Appellant,

vs.

EDDY'S STEAM BAKERY, INC., a Corporation,

Appellee.

Brief of Appellant

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

WELLINGTON D. RANKIN,
United States Attorney
for the District of Montana.

ARTHUR P. ACHER,
Assistant United States Attorney.

JOHN R. WHEELER,
Special Attorney
Bureau of Internal Revenue.

Attorneys for Appellant.

STATEMENT OF THE CASE

This is an appeal from a judgment entered in the District Court of the United States for the District of Montana against C. A. Rasmusson, as collector of Internal Revenue, defendant below for the sum of $3,819.63 collected from Eddy's Steam Bakery, Inc., a corporation, plaintiff below, by the collector on account of an income tax assessed for the calendar year 1921.

The plaintiff and appellee corporation, was originally organized as a corporation under the name of O'Connell and Gallivan Company in 1918, and the name was subsequently changed to Eddy's Steam Bakery, Inc., in 1923: (Tr. 2). It alleged in its complaint that the defendant Internal Revenue Collector, the appellant herein, demanded $3,037.41 and interest in the sum of $782.22, a total of $3,819.63 from said appellee shortly after February 9, 1926, by reason of a determination as of that date by the Commissioner of Internal Revenue that a deficiency tax in the amount of $3,037.41 had been assessed against said corporation for the year 1921 (Tr. 4): that said sum was paid under protest on November 17, 1926 (Tr. 4): and that said tax was wholly unlawful and void for the reason that the corporation was not doing business in 1921 and consequently had no income. In this connection the plaintiff alleged:

VIII.

"That prior to December 31, 1920, plaintiff granted, sold, transferred and delivered to one J. E. O'Connell of Helena, Montana, all its property and business.

IX.

"That said alleged tax and the assessment, and the whole thereof, is wrongfully, unlawful and void, in this that, this plaintiff transacted no business whatever during the calendar year 1921, or any part thereof, and that this plaintiff neither earned, nor received, nor acquired, nor was entitled to any income or profits whatsoever for or during said calendar year 1921." (Tr. 5.)

The answer of the defendant and appellant collector denied that the business had been sold and transferred to J. E. O'Connell prior to December 31, 1920, and denied that the plaintiff corporation transacted no business during the calendar year 1921 (Tr. 22-23). This was the only issue in the case, as was conceded by counsel for the plaintiff and appellee in his opening statement as follows:

"If the court please: This case No. 1399, Eddy's Steam Bakery, Incorporated, vs. C. A. Rasmusson, Collector. The action is against the Collector to recover approximately $3800.00 in income taxes; that is, principal and interest in income taxes paid by the plaintiff here after the assessment levied by the Commissioner in 1926. The tax is for the year 1921. *The only issue left*

in the case after the pleadings is the question of whether or not the corporation, plaintiff, conducted this business, or any business, in 1921, or, as the plaintiff contends, the business was conducted by the individual O'Connell.

I call the Court's attention to the title, Eddy's Steam Bakery. In 1920, 1921 and 1922 the name was O'Connell and Gallivan Company, the name having been changed in '23 or thereabouts. There is no question as to the amount, in taxes, so this amount is proper.

THE COURT: Somebody did business, and it was charged up to this plaintiff.

MR. WEIR: Somebody did business and it was charged up to this plaintiff, the income for the year in question.

THE COURT: He paid the taxes?

MR. WEIR: Yes, sir; paid the taxes.

THE COURT: Wouldn't the tax be higher for the corporation than the individual?

MR. WEIR: Yes, for this particular year; *that is one of the chief motives in undertaking the change.*" (Italics ours) (Tr. 26-27.)

A jury having been waived in writing (Tr. 24) the cause was tried before the court, Judge Geo. M. Bourquin presiding. The court after considering the evidence filed a written opinion finding in favor of the plaintiff corporation, holding that the corporation had no income in 1921 and that the tax had been illegally assessed (Tr. 65-69). In accordance with the court's opinion, judgment was entered against the Collector of Internal Revenue on February 11, 1931 (Tr. 73), and this appeal is prosecuted accordingly.

ASSIGNMENTS OF ERROR.

I.

The Court erred in concluding, deciding and ordering that the plaintiff above named, is entitled to recover, and that judgment should be entered in favor of said plaintiff and against the defendant.

II.

The Court erred in deciding that prior to December 31, 1920, the plaintiff above named granted, sold, transferred and delivered to one J. E. O'Connell of Helena, Montana, all of its property and business.

III.

The Court erred in holding and deciding that although the transfer of the property of said plaintiff on or about January 1, 1921, to J. E. O'Connell was fictitious in so far as a transfer of the former's assets to the latter was concerned, said transfer would prevail against the United States and render illegal the tax assessed by the Commissioner of Internal Revenue under the provisions of the Act of Congress referred to as the Revenue Act of 1921 and assessed against said plaintiff as a deficiency assessment for income and excess profits taxes for the calendar year 1921.

IV.

The Court erred in holding and deciding that the plaintiff above named transacted no business in the calendar year 1921, and neither earned, received or acquired, nor was entitled to any income or profits whatsoever for or during said calendar year.

V.

That the evidence is insufficient to support the findings and conclusions of the District Court.

VI.

That the evidence is insufficient to support a finding that on or about December 31, 1920, plaintiff granted, sold, transferred or delivered to one J. E. O'Connell all its property and business.

VII.

That the evidence is insufficient to support a finding that the plaintiff above named was not doing business and/or neither earned, received, acquired or was entitled to any income or profits during the calendar year 1921.

VIII.

That it affirmatively appears from the evidence herein that said plaintiff was doing business and had a taxable income during the calendar year 1921 upon which the income tax collected by the defendant herein for and on behalf of the United States, was due, legal, valid and properly collected. (Tr. 76-77-78.)

ARGUMENT

THE PURPORTED SALE OF THE CORPORATION ASSETS TO O'CONNELL ON JANUARY 1, 1921, WAS FICTITIOUS, A SHAM AND NOT A LEGAL TRANSACTON.

The District Court held in effect that notwithstand-

ing the transfer of the property of the corporation to J. E. O'Connell was fictitious, yet it was sufficient to vest in O'Connell the income accruing from his use of the property, and that consequently, the corporation had no income in 1921. The assignments of error are all designed to direct the attention of the Court to the alleged error of the Court in holding that the transaction in question operated to divest the corporation of any income in 1921 and consequently rendered illegal the tax assessed against it during that year.

While the District Court held the alleged sale of the corporate assets to O'Connell on January 1, 1921, to have been fictitious, the facts are briefly reviewed to the end that proper consideration may be given to the legal effect of the transaction.

Mr. J. E. O'Connell testified that he and Mr. Gallivan had gone into partnership in 1910, operating a restaurant known as Eddy's Restaurant and that they had likewise operated a bakery known as Eddy's Steam Bakery since 1916; a corporation known as the O'Connell and Gallivan Company was organized and had owned both enterprises since 1918; that Mr. O'Connell purchased the restaurant from the Corporation in September 1920, and then sold it to Mr. Gallivan and that he continued to operate the bakery business as a corporate entity during the balance of the year 1920, but that he operated the bakery as an individual in 1921 (Tr. 28-29). From the income tax returns of

O'Connell, it will be noted that he received a salary of $7,500 as manager of the Corporation in 1920 and a like salary from the "Eddy Steam Bakery" in 1921. Mr. O'Connell owned all of the stock in the corporation except two qualifying shares during the period in question (Tr. 37).

The minutes of the corporate meeting purporting to show the sale of the corporate assets to O'Connell as an individual on January 1, 1921 were introduced in evidence. First appear minutes of a directors meeting as follows:

> "Mr. J. F. O'Connell presented a proposal from Mr. J. E. O'Connell that he be allowed to purchase the assets, good will, trade name, etc., of the O'Connell & Gallivan Company, at book value as of date December 31st, 1920, and that he would assume any and all outstanding liabilities of the Company that existed at that time.
>
> It was moved, seconded and carried that this proposal be accepted.
>
> There being no further business before the meeting, meeting adjourned." (Tr. 36.)

The stockholders' meeting was held one hour later, and the following proceedings were then had:

> "Mr. J. F. O'Connell read the minutes of the meeting of the Board of Directors, held at 2 P. M. of this date. It was moved and seconded that the action of the Board of Directors in disposing of the assets of the Corporation to Mr. J. E. O'Connell be confirmed.

There being no further business the meeting was adjourned." (Tr. 37-38.)

In connection with the alleged sale, Mr. O'Connell testified:

"A record was kept of the action of the Board of Directors. I have that record, a Minute Book. You may see it. (Book handed to Counsel by Mr. Weir.)

When this transfer was put through, *I did not pay any money to the corporation. I own all the stock in the corporation.*" (Tr. 29.)

Mr. O'Connell admitted that the purpose of the alleged transfer was to reduce the taxes. Thus he testified on cross-examination:

"Q. The sole purpose of this transfer as I take it from the record, was to lower the taxes of the corporation, isn't that true?

A. To run the business at a lower cost.

Q. Yes. And it is a fact the taxes would be reduced because of the excess produced by the taxes of 1921?

A. Yes, sir.

Q. Well; it is a fact that you did want to get away from the higher taxes? Isn't it?

A. Why, certainly.

Q. And that was the purpose of the transfer, wasn't it?

A. That was the principal reason." (Tr. 30.)

Mr. Galusha, the accountant for the corporation,

testified that he had advised the transfer (Tr. 42) that no bill of sale was given (Tr. 45), and that nothing was distributed to the stockholders after the alleged sale of the corporate property to O'Connell (Tr. 44).

Mr. Atwater, the internal revenue collector who examined the corporate books, testified to an interview with Mr. O'Connell in which the latter admitted that there had been no deed of transfer (Tr. 56) and that O'Connell had not surrendered his stock in the corporation in payment for its assets (Tr. 57).

Mr. O'Connell testified that the billheads were changed in 1921. That previously they had been headed "O'Connell and Gallivan Incorporated" while during that year they were headed "J. E. O'Connell" he said "to inform the people because of the sale; that we were operating as an individual" (Tr. 61).

The bill heads were introduced in evidence. Before 1921 the bill heads were as follows:

In account with
Eddy's Steam Bakery
O'Connell & Gallivan Co., Inc.

While in 1921, the bill heads read:

In account with
Eddy's Steam Bakery
J. E. O'Connell."
(Tr. 64)

Of course, the bill heads are of little evidentiary

value as Eddy Gallivan had gone out of partnership with O'Connell in September, 1920 and this change in the bill heads might well have been intended to notify the public that Gallivan was no longer interested in the bakery.

Under the Revenue Act of 1918 (40 Stat. 1088) an excess profits tax was levied upon corporations but the Act of 1921, only provided for its imposition "For the calender year 1921," (41 Stat. 271). The transfer of the bakery business from the corporation to O'Connell as an individual was of course designed to avoid this tax. Judge Bourquin succinctly stated the facts as follows:

> "The evidence is that January 1, 1921, O'Connell and Gallivan, a corporation, then and for some time had owned and operated Eddy's Steam Bakery. O'Connell owned all the stock save qualifying shares. Income taxes greater upon corporations than upon individuals, O'Connell and his 'attorney' Galusha, in the words of a noted character of the day 'Skum a skeme' the bakery to be transferred to and operated by O'Connell. Accordingly, the day last aforesaid a special meeting of the corporate directors accepted O'Connell's proposal to buy all corporate assets, including trade name and good will, at book value, and a like meeting of all stockholders confirmed the transaction. There were no documents of transfer, no money paid, no note executed, no transfer of stock, though Galusha testified the stock was pledged to the corporation to secure the debt of which O'Connell professes ignorance and is no record." (Tr. 65.)

Since the higher tax was not imposed after the year 1921, on January 2, 1922 the business was allegedly bought back by the corporation from O'Connell. The minutes of the meeting of the directors of the corporation on that date recite:

> "Mr. J. F. O'Connell presented a proposal from J. E. O'Connell in which Mr. J. E. O'Connell proposes to sell the Assets, Good Will, Trade Name, etc. of the Bakery, operated by him, under the trade name of Eddy's Steam Bakery, at the book value as shown by his books, as of date Dec. 31, 1921, and that the Company should assume any and all outstanding liabilities of the said Bakery that existed at that time. Mr. O'Connell states that the total assets were $55,564.99, and that the liabilities of the bakery at that time were $8,537.93, leaving a net worth of $47,027.06.
>
> It was moved, seconded and carried that this proposal be accepted.
>
> There being no further business before the meeting the meeting adjourned." (Tr. 39.)

And the minutes of a stockholders meeting on the same date set forth that:

> "Mr. J. F. O'Connell read the minutes of the meeting of Board of Directors, held at 2 P. M. of this date.
>
> It was moved, seconded and carried, that the action of the Board of Directors in purchasing the Assets of the Bakery, operated by J. E. O'Connell, under the trade name of Eddy's Steam Bakery, at the book value as of date Dec. 31, 1921 be confirmed.

> There being no further business the meeting was adjourned (Tr. 40-41).

In this connection Judge Bourquin said:

> "The Revenue Act of 1921 diminished the spread between corporation and individual taxes, and January 2, 1922, the corporate directors accepted another proposal from O'Connell that it re-purchase the assets aforesaid at book value. Again, were no documents, no money paid, and O'Connell 'presumes the stock was in the same condition as in 1921'; but Galusha testifies the debt was cancelled and the stock returned, though again, no record thereof. Thereafter, the corporation operated the bakery and in 1923 substituted the latter's name for its own. In 1926 the Commissioner assessed against the corporation some $3000 income taxes for 1921, which the corporation paid, and this action followed." (Tr. 66.)

We submit that in view of the fact that the distinction between a corporation and its stockholders for income tax purposes is preserved even where one person owns all the stock, appeal of *Winthrop Ames,* 1 B. T. A. 63; *Eisner v. Macomber,* 252 U. S. 189, 214; *Cullinan vs. Walker,* 262 U. S. 134, *International Building Company v. Commissioner,* 21 B. T. A. 617, if a sale was not effected the corporation did business in 1921 and was properly assessed with the tax collected.

In *Weiss v. Stearn,* 265 U. S. 242 at 254 the Court said:

> "Questions of taxation must be determined by viewing what was actually done, rather than the declared purpose of the participants; and when applying the provisions of the Sixteenth Amendment and income laws enacted thereunder we must regard matters of substance and not mere form."

Also see *United States v. Klausner* (C. C. A. 2) 25 F. (2d) 608:

The Circuit Court of Appeals for this circuit in *Wehe v. McLaughlin*, 30 F. (2d) 217 indicated that the motives of a party were immaterial, but that a transaction entered into to avoid income taxes must be a *legal transaction*. There a husband sought to convey property to his wife to reduce income taxes. The court said:

> "*But we may consider motive or purpose in construing the written instrument and determining its true intent.* If to avoid paying an income tax, the appellant had seen fit to reduce his income by charging smaller fees, or in advance donating a percentage thereof to his wife or other person, that might have been his right. But, in view of the ease with which the obligation to pay income taxes could be so evaded, the instrument of waiver or grant should be unequivocal and unconditional." (Italics ours.)

It will be noted that at the stockholders meeting while it was moved and seconded that the action of the directors be confirmed, the minutes do not indicate

that the motion *carried*. A sale was perhaps *authorized*, but never *completed*.

The minutes of the corporation meeting disclose that Mr. O'Connell proposed "That he be allowed to purchase the assets of the O'Connell & Gallivan Company," and that the corporation assented thereto through its board of directors.

The question then is: If O'Connell says, "May I be allowed to purchase at book value?" and the corporation says "Yes," is a sale effected and does title pass? We submit that title does not pass. If A says to B, "Can I purchase your store for $1000," and B says "Yes, you can," it surely will not be contended that at that time title passed. At most B has merely given A the *privilege* of buying on payment of the requisite consideration. So in this case, when the directors, speaking for the corporation said to O'Connell, "Yes, you may be allowed to purchase the assets of the corporation at book value, the corporation was giving O'Connell a privilege which he was entitled to exercise upon payment of the consideration.

The word "allow" means to give consent to do some act or to grant a privilege, *McLures Estate*, 68 Mont. 556 at 566: *Marshall v. Franklin Fire Ins. Co.* (Penn.) 35 Atl. 204.

In construing Section 6879, R. C. M. 1921, as to when title passes, to personal property, the court said in *Adlam v. McKnight*, 32 Mont. 349, 353;

> "An analysis of this section shows that the actual passing of title, as between the parties to the contract, as made dependent upon, first, *the intention of the parties;* and, second, the identification of the thing sold" (Italics ours).

The minutes of the corporation directors' and stockholders' meetings disclose no intention to pass title by the action of the directors and stockholders alone.

In the case of *McKey v. Clark* (C. C. A. 9) 233 Fed. 928, 933, the court in speaking of an option contract said:

> "But in the case before us, until the option was determined no title passed from Myers, the owner, to Tomlinson Homes, and in the absence of clear evidence to the contrary, it is not to be presumed that the owner intended that title should pass until the purchase price was paid."

The language of the court in *Loud v. Hanson,* 53 Mont. 445, 449, would seem applicable:

> "The essential fact is that, he and Macer agreed, as they had a right to do, upon a sale which was to be for the equivalent of cash, to-wit, credit to Hanson at the Farmers & Traders State Bank. *Until this consideration passed, the sale was incomplete,* and title to the property did not vest in Macer." (Italics ours.)

Here the corporation agreed to sell the assets to O'Connell at book value, but he did not fulfill his

part of the agreement. No consideration was paid by O'Connell and the capital stock held by him in the corporation was not returned. If this was a valid sale, the corporation was in the position of having dissipated its assets with its capital stock still outstanding.

The payment of the purchase price, as we construe the minutes of the corporation meeting, being a condition precedent to the consummation of the sale, the language of the court in *Crancer v. Lareau* (C. C. A. 8) I. F. (2d) 117 at 122 seems persuasive:

> "Where the condition precedent to an acceptance of the option to purchase is the payment of the price, verbal or written notice of an intention to accept, or of an acceptance without the actual payment of the price, does not constitute a valid acceptance or election to take advantage of the option and is futile * * *"

In *Lucas v. North Texas Co.,* 281 U. S. 11 at page 13 the Court considered an option contract and said:

> "An executory contract of sale was created by the option and notice, December 30, 1916. In the notice the purchaser declared itself ready to close the transaction and pay the purchase price 'as soon as the papers were prepared.' Respondent did not prepare the papers necessary to effect the transfer or make tender of title or possession or demand the purchase price in 1916. The title and right of possession remained in it until the transaction was closed."

It will be noted that in the minutes of the meeting held September 27, 1920, when the Restaurant was sold to O'Connell it was provided that "The officers of this corporation execute and deliver the necessary papers to effect said sale" (Tr. 33) so it cannot be said that it was the usual practice for the corporation to sell its assets by a minute entry alone.

Section 6004 R. C. M. 1921, provides for the procedure whereby a corporation may sell its assets. That section provides for the filing of the minutes of the corporate meeting authorizing a sale in the office of the County Clerk and Recorder to thereby give notice to the world of the sale, *but there is no evidence that that was done in this case.* That section also contemplates the execution of conveyances transferring the title independent of the minutes of the corporation meeting.

Section 6005 R. C. M. 1921 provides that upon the sale of the whole of the property of the corporation it shall thereby be dissolved. In *Daily v. Marshall,* 47 Mont. 377 at 392 in construing this section (then Sec. 3898) the court said:

> "By section 3898 a sale by a corporation of all of its property ipso facto operates as a dissolution."

Here the corporation contends that it was not dissolved and admits operating the business in 1922 and

in subsequent years. Under the law the corporation could not exist after it had sold its assets.

In interpreting an equivocal transaction, motives may be considered as bearing on the real nature thereof, *Brunton v. Commissioner of Internal Revenue,* (C. C. A. 9) 42 F. (2d) 81 and we submit that in the light of all the evidence, the contention that a sale was effected cannot be sustained.

The income tax return filed by the corporation for 1921, recites "Nature of Corporation—Inactive * * * no income or expense" It will be noted that under schedule A 22 of the return, provision is made for reporting the sale of capital assets. Article 546 of Regulation 62 relating to income tax provides: "When property is acquired and later sold for a higher price the gain on the sale is income." If a bona-fide sale of the corporation assets had been made to O'Connell, it would have disclosed the sale on its return for 1921. Mr. O'Connell's income tax returns disclosed that he collected a salary of $7500 per year from the corporation in 1920 and 1922 and a like salary from the "Eddy Steam Bakery" in 1921. He admitted that he had always managed the bakery business, and it was carried on the same throughout all the years.

We submit that this was not a bona-fide transaction such as will preclude the government from retaining the tax here collected.

The decision of the Board of Tax Appeals in the

case of *Rice-Sturtevant Automobile Co. v. Commissioner of Internal Revenue*, 6 B. T. A. 793, is directly in point. There the board said:

> "PHILLIPS: The sole question at issue is whether or not a partnership was formed on July 31, 1919, which took over the assets and liabilities of the corporation other than its real estate and real estate liability, and thereafter operated the business of selling Ford cars, parts, and service. There was introduced as a part of the evidence a bill of sale, dated July 31, 1919, and a certified copy of the certificate filed in the office of the Recorder of Deeds, County of Jackson, Missouri, showing the change of name. The only other evidence is the testimony of one of the two stockholders of the corporation that a written agreement of partnership was entered into and that the business was thereafter transacted by the partnership. This witness was unable to say how the consideration of $15,609.06 set forth in the bill of sale was paid or whether it was ever paid. He was unable to state whether any notice to creditors of the sale in bulk of the assets of the corporation had been given as required by the laws of the state. He was unable to recall any one who had been told of the existence of the partnership. He was unable to recall that any assignment had ever been made of the contract between the corporation and the Ford Motor Co. under which the corporation acted as agent or any recognition by the Ford Motor Co. of the partnership, or, in fact, any notice to them of the change of the corporate name, stating that the business continued to be sent to the Ford Motor Co. in the name of Rice-Sturtevant Motor Co. which was the name of the corporation prior to the change

and the formation of the alleged partnership.

No books of account of the partnership or of the corporation were produced, no part of the record of the bank in which it is claimed that two separate accounts were kept was produced, none of the canceled checks of the so-called partnership were produced, none of its letterheads or of the letters sent out by it were produced, nor is the absence of any evidence of such a collateral nature, which might have supported the contention of the petitioner, excused in any way.

The record is not convincing tha there was in fact any bona fide delivery of the bill of sale which was executed on July 31, 1919, *or any bona fide transfer of the assets named, or that the business was in fact carried on by the partnership and not by the corporation. It does not justify us in disturbing the determination of the Commissioner."* (Italics ours.)

The case at bar is much stronger than the above case because here there was admittedly no consideration for the alleged sale, no bill of sale, and none of the elements of a completed transaction.

It would seem that this case is similar to that of *Capps Mfg. Co. v. United States* (C. C. A. 5) 15 F. (2d) 528. There the appellant corporation owning all of the stock in Capps Cotton Mills, Incorporated, attempted to establish a sale of the assets of that corporation to itself for income tax purposes since Capps Cotton Mills had a gain which would be offset by appellant's loss if Capps Cotton Mills had been sold to appellant. The appellant had entered an agreement

"to undertake to purchase all the property of Capps Cotton Mills."

The court said:

> "Under the evidence there is no merit in the contention that the appellant was the purchaser in good faith of the assets of Capps Cotton Mill. There was no semblance of a sale of such assets to the appellant. After it became sole owner of the capital stock, the appellant took over the assets of that corporation, without any sale or transfer thereof by that corporation, and thereafter used and dealt with such assets as its own property. *The fact that the above-mentioned agreement shows that a purchase by the appellant of all the property of Capps Cotton Mill was contemplated is not evidence that such a purchase was made.*" (Italics ours.)

And the court in the case at bar held that the sale was fictitious and not in good faith, and said:

> "It is of course true that an owner lawfully may and many do abandon or sell property to escape taxes. To be lawful, however, the sale must be real and not sham, permanent and not temporary, in good faith to transfer the property and not merely to pass title to evade taxes, that accomplished, title to be restored. Substance and not form, intent and not declarations give color to and determine the character of the transaction when in issue. The law looks quite through all camouflage to discover what lies behind.
>
> See Shotwell vs. Moore, 129 U. S. 596;
>
> 37 Cyc. 770 and cases.
>
> With these principles in mind, it is obvious that

> the transaction between the corporation and O'Connell was fictitious in so far as transfer of the former's assets to the latter is concerned, and had it been to defeat taxes upon the property itself, would have been illegal and ineffective." (Tr. 67-68.)

The District Court having held that the sale upon which the claim of the Appellee is founded is fictitious and a sham, it would seem that properly the only matter before this court is the question of the taxability of the income received from a business belonging to the corporation.

THE PURPORTED TRANSFER OF THE CORPORATE ASSETS TO O'CONNELL HAVING BEEN FICTITIOUS, IT DID NOT OPERATE TO DIVEST THE APPELLEE CORPORATION OF THE INCOME RECEIVED FROM THE BUSINESS IN 1921.

The court came to the conclusion that notwithstanding the fact that the sale was fictitious, the corporation had no taxable income in 1921, and said:

> "But that is not this case; not taxes upon *property* but taxes upon *persons* based on *income* alone are involved.
>
> If the corporation had no income, the law imposed no taxes, however much property it owned; and that, whether lack of income was due to poor management, poor business, poor patronage or no collections, or inaction or suspension of business.

> Moreover no taxes even though the corporation improvidently gave to another the right to operate its instrumentalities, conduct the business, and take and enjoy the profits.
>
> That is the instant case. Fictitious though the transaction was, it would prevail against all save corporate creditors. (Tr. 68) * * *
>
> The case is as simple as that of John Jones who that year permitted his son Sam to farm his father's land and take the profits. However large the latter, clearly no taxes were due from John. With that case, this is all-fours, even though confused by a disingenuous scheme." (Tr. 69)

We agree with the court in its conclusion that the transfer between the corporation and O'Connell was fictitious in so far as a transfer of the former's assets to the latter is concerned, but submit that the court erred in coming to the conclusion that notwithstanding the fact that the sale was fictitious, still it accomplished the purpose for which it was designed and resulted in the corporation evading an income tax in 1921.

In the foregoing two excerpts from the court's opinion we submit the fallacy of the reasoning employed is demonstrated. Admittedly the transfer from the corporation to O'Connell was *ficiitious*. But in the example cited John Jones permits his son Sam to farm his father's lands and take the profits. The example is not on all fours with the case at bar. To make the example analogous it should be stated that John Jones fictitiously but not in fact purports to permit his son

Sam to run the farm and take the profits so that the father John may avoid and evade additional income taxes. *The transfer was fictitious, and therefore there was no transfer and the corporation did the business in 1921*, and is liable for an excess profits tax on the profits received.

The court below has taken the anomalous position of holding that the sale concocted and here relied upon to avoid taxation was a sham and at the same time allows the appellee to take advantage of it and defeat a legal tax and thereby attain the end desired.

The court bases this position upon the theory that while to defeat a property tax this sale would have been illegal, that is not the case: not taxes upon property, but taxes upon persons based upon *income* alone are involved (Tr. 68).

Contrary to the holding of the court below in this regard the tax here involved is not a tax upon *persons* based upon *income*, but it is a tax upon *income* payable by *persons*. As far as being a tax upon persons is concerned, the income tax and a property tax are not distinguishable. The entire property of the taxpayer is security for the payment of the income tax as well as the property tax. Consequently, a sale which would defeat one would defeat the other.

The corporation alleged in its complaint and sought to prove that it had sold its property to J. E. O'Connell, and took the position that this was a valid sale, seeking

to come within the rule established by the Supreme Court to the effect that although a transaction is a device to avoid the payment of taxes, it is not subject to legal censure if carried out by means of legal forms, *United States v. Isham,* 17 Wall. 496, 506; and see *Brunton v. Commissioner of Internal Revenue,* (C. C. A. 9) 42 F. (2d) 81, 83.

But the district court held that there was not a legal transfer; that it was a fictitious and sham transfer of title and would not prevail against corporate creditors. The same district court in a decision rendered in 1920, *United States v. McHatton* (D. C. Mont.) 266 Fed. 602 held that taxes were of a higher nature than debts and the government of a higher nature than a creditor, and in *Fraser v. Nauts,* (D. C. Ohio) 8 F. (2d) 106 it is stated that the government though a third person is in a position to question the good faith of a transaction because of its taxing interest, *Leydig v. Commissioner of Internal Revenue,* (C. C. A. 10) 43 F. (2d) 494.

It is, therefore, respectfully submitted that following the reasoning of the court below to its logical conclusion judgment should have been entered for the appellant.

The plan evolved by O'Connell in the instant case is, under the circumstances, nothing more nor less than an attempted assignment by the corporation of its income to O'Connell.

Numerous cases on this point have been submitted to the Federal courts and to the United States Board of Tax Appeals and decided adversely to the so-called assignment, the income having been held to be taxable to the assignor *(Mitchel v. Bowers,* 15 F. (2d) 287, cert. denied 47 S. Ct. 473; *Lucas v. Earl,* 281 U. S. 111; *Leydig v. Commissioner* (C. C. A. 10) 43 F. (2d) 494; *Stokes v. Commissioner,* 22 B. T. A. 1386; *Alexander S. Browne,* 3 B. T. A. 826; *Arthur F. Hall,* 17 B. T. A. 752; *L. Brackett Bishop,* 19 B. T. A. 1108; *Edward J. Luce,* 18 B. T. A. 923).

In *Ward, etc. v. Commissioner,* 22 B. T. A. 352, the United States Board of Tax Appeals considered the taxability of the income from leases originally payable to decedent, but the petitioner contended, "legally transferred to his wife before maturity and payment." In deciding that the income was taxable to the decedent the Board said, in part:

> "Looking first to the payments made to decedent's assignees by the bank out of funds collected under the so-called Pohlman property lease, it is noted that they were from the residue of the rental paid by the lessees under their lease from decedent after obligations of said lessor to prior landlords were paid. This was (1) in accordance with the terms of the lease, which made the bank agent for decedent and his lessees to receive and disburse the rents, and (2) the decedent's directions to the bank to pay the net balance to his assignees. It was this residue or 'net rentals,' as so characterized by decedent in describing the

interest intended to be assigned of the total rents paid which decedent assigned to his wife and sister, and which was paid to them by the bank after all other charges against decedent's interest were liquidated. Since the status of the decedent, as lessor, under this lease remained unchanged and all payments of rent were made to his nominee, it follows that when so made they belonged to him and were a part of his income when received by the bank.

* * * * * *

"In each of the several decisions cited by the petitioners to sustain their contentions, the basic facts have shown not simply that the rights involved were such as could be legally assigned, *but the further fact that the assignor had in each case acually parted with all or some part of his title to the income-producing corpus.* (Italics ours)

In *Lucas v. Earl*, 281 U. S., 111, 114, the taxpayer had entered into a contract with his wife whereby his earnings were to become the joint property of himself and his wife. It was argued that the statute seeks to tax only income beneficially received and that since the taxpayers earnings became joint property on the first instant when they were received, he should be subjected to a tax on but one-half of them. The court held the taxpayer liable for a tax on the entire income and said:

"But this case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing act. There is

> no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and *we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew.*" (Italics ours)

So in this case it is submitted that the tax may not be avoided by an arrangement by which the fruits are attributed to a different tree from that on which they grew.

It appears from the decisions that in the reported cases the question of who is liable for the income tax upon a business is to be determined by first determining to whom the business belongs. We are unable to distinguish this case from that of *Capps Mfg. Co. v. United States* (C. C. A. 5) 15 F. (2d) 528, heretofore cited. There, even though the appellant owned all of the capital stock of Capps Cotton Mills, the court held the latter liable in its own name for income taxes during the period in question and even though as the court said:

> "After it became sole owner of the capital stock, the appellant took over the assets of that corporation, without any sale or transfer thereof by that corporation, and thereafter used and dealt with such assets as its own property."

If the decision in the case at bar correctly states the law, it establishes a new principal by the application of which any legislative attempts to tax corporations at a higher rate than individuals may be completely defeated. The cases heretofore cited have looked at the character of the transaction and endeavored to determine who owns an income producing business as a condition precedent to a consideration of the question of whom is liable for the tax, *Wehe v. McLaughlin,* (C. C. A. 9) 30 F. (2d) 217; *Capps Mfg. Co. v. United States,* (C. C. A. 5) 15 F. (2d) 528; *Rice-Sturtevant Automobile Co. v. Commissioner,* 6 B. T. A. 793, *Van Meter v. Commissioner,* 22 B. T. A. 1202. Thus in *Leydig v. Commissioner of Internal Revenue* (C. C. A. 10) 43 F. (2d) 494, 495, the court said:

> "A contention of the petitioner is that the wife became a half owner of the land when it was acquired and for that reason owned one-half of the royalties. The Board ruled to the contrary as she furnished no consideration therefor and her title could not be enforced under the Statute of Frauds. The answer was that a third party may not question the title on either ground, or gainsay the trust capacity in which petitioner held the title. Concededly, he might have made an effective gift of a half interest in the land. Bing v. Bowers (D. C.) 22 F. (2d) 450, affirmed in (C. C. A.) 26 F. (2d) 1017. *But his acquisition and retention of the legal title enabled him to assert or disclaim ownership at will, and subjects him to the entire tax under the rule announced in Wehe v. McLaughlin (C. A. A.) 30 F. (2d) 217.* And the

> Title may be attacked by the government in order to hold him as the legal owner for income taxes. Rosenwald v. Commissioner (C. C. A.) 33 F. (2d) 423." (Italics ours)

Here the court says:

> "Although the intent of the transaction was a sham transfer of title to the property, it was also to really vest O'Connell with all income accruing from his use of the property, thereafter both intents equally executed." (Tr. 69)

Apparently the court has taken the position that since O'Connell says he intended to operate the business as an individual in 1921 and did operate it as his own, the intent was executed, and the income was thereby divested from the corporation. We respectfully submit that the decisions do not support this as the proper method of determining in whom an income vests. And we submit it is directly contrary to the rule expressed by the Supreme Court in *Corliss v. Bowers,* 281 U. S. 376, 378 where the court said:

> "Still speaking with reference to taxation, if a man disposes of a fund in such a way that another is allowed to enjoy the income which it is in the power of the first to appropriate it does not matter whether the permission is given by assent or by failure to express dissent. The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not."

That is, the test is not whether or not the corporation did as the court said, improvidently give to another the right to take and enjoy the profits. It is the corporation's own concern if it does not desire to enjoy the profits of its business. The test rather is, did the corporation part with its ownership in the income producing business.

A corporation is an entity distinct from its stockholders and a sole stockholder cannot ignore the corporation's existence *Watson v. Bonfils,* (C. C. A. 8) 116 Fed. 157, 167; no doubt any contracts made by O'Connell in 1921 in connection with the bakery business would have been binding on the corporation, *Norma Mining Co. v. MacKay* (C. C. A. 9) 241 Fed. 640, 644, and O'Connell being the sole stockholder sustained a fiduciary relationship to the corporation and his acts in managing the business in 1921 must be deemed to inure to its advantage, *Alaska Juneau Gold Mining Co. v. Ebner Gold Mining Co.* (C. C. A. 9) 239 Fed. 638, 643.

If the business was not sold by the corporation we submit that in law it had a legal claim at all times to the income from the business. True its right to take the profits was not asserted because O'Connell owned all the stock, but the right existed nevertheless. As the Supreme Court said in *Corliss v. Bowers,* 281 U. S. 376, 378 the income was subject to the corporation's unfettered command throughout the year 1921, and

should be taxed to it whether the corporation saw fit to enjoy it or not.

We respectfully submit that the decision of the district court should be reversed with directions that the action be dismissed.

Respectfully submitted,

WELLINGTON D. RANKIN,
United States Attorney
for the District of Montana.

ARTHUR P. ACHER,
Assistant United States Attorney.

JOHN R. WHEELER,
Special Attorney
Bureau of Internal Revenue.

Attorneys for Appellant.

NO. 6537

United States Circuit Court of Appeals

For the Ninth Circuit

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,

Appellant,

vs.

EDDY'S STEAM BAKERY, INC., a Corporation,

Appellee.

Petition for Writ of Certiorari for Diminution of Record

T. B. WEIR
HARRY P. BENNETT
Attorneys for Appellee.

NO. 6537

United States Circuit Court of Appeals

For the Ninth Circuit

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,

Appellant,

vs.

EDDY'S STEAM BAKERY, INC., a Corporation,

Appellee.

Petition for Writ of Certiorari for Diminution of Record

Comes now the Appellee, Eddy's Steam Bakery, Inc., a corporation, and petitions and shows:

I.

That by Assignment of Error No. V herein the Appellant specifies as error that the evidence is insufficient to support the findings and conclusions of the District Court.

II.

That attached hereto are respectively copy of a contract between Louis Stadler and Louis Kaufman on the one part and J. E. O'Connell and E. H. Gallivan on the other part, which said contract is marked Plaintiff's Exhibit 2, and a copy of a deed in which said Stadler and Kaufman are of the one part and J. E. O'Connell is of the other part, which said deed is marked Plaintiff's Exhibit 3. That said documents are the same documents referred to in the printed record at pages 48 and 49 thereof as "Defendant's 2 and 3" and Exhibit 2 and Exhibit 3, respectively.

III.

That said documents, and each thereof, were offered and received in evidence upon the trial of this cause.

IV.

That said documents are in effect by said reference in said transcript and bill of exceptions made a part of the said bill of exceptions as settled in this cause.

V.

That by inadvertence and mistake said documents were not printed in the record of this cause as a part of the bill of exceptions, nor were they certified up to this Court as original exhibits.

VI.

That in the preparation of the record on appeal, Attorneys for Appellant presented to T. B. Weir, as Attorney for the Appellee herein, a stipulation for the submission of Exhibits numbers 5 to 10, inclusive, to this Court as original exhibits, according to the reference made at page 87 of the Transcript herein and to the order of Court of July 2, 1931. That Appellee's said attorney, at the time of signing said stipulation, understood from conversation with attorney for Appellant that all other original exhibits referred to in the bill of exceptions, with the exception of said numbers 5 to 10, both inclusive, would be included in the printed record.

That Appellee relied on such impressions, and because part of the original exhibits had been certified as original exhibits to this Court, at the time the printed transcript was served on Appellee the Appellee mistakenly assumed that all original exhibits, as such, had been certified to this Court as part of the original record.

VII.

That Appellee has just this day discovered that plaintiff's said Exhibits 2 and 3 had not been certified up as a part of the original records in this case and are not contained in the printed record.

VIII.

That said exhibits are necessary to a consideration of said Specification of Error No. 5 and should be included as a part of the record in the cause.

WHEREFORE, Petitioner prays that Writ of Certiorari, or other appropriate Writ, be granted by this Court for a diminution of the record in this cause to include said documents, Plaintiff's Exhibits 2 and 3, respectively, as a part of the record on appeal herein.

EDDY'S STEAM BAKERY, INC., Appellee,
By T. B. WEIR
Its Attorney.

State of Montana, County of Lewis and Clark—ss.

T. B. Weir, being first duly sworn, deposes and says: That he is one of the Attorneys for the Appellee, Eddy's Steam Bakery, Inc., in the foregoing cause; that he has read the foregoing petition and knows the contents thereof, and the matters and things therein stated are true of his own knowledge.

T. B. WEIR.

Subscribed and sworn to before me this 29th day of December, 1931.

(Notarial Seal) JOHN J. MITCHKE,
Notary Public for the State of Montana, Residing at Helena, Montana. My Commission expires May 1st, 1933.

NOTICE

TO C. A. RASMUSSON, AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MONTANA, APPELLANT HEREIN, AND TO WELLINGTON D. RANKIN AND ARTHUR P. ACHER, ATTORNEYS FOR APPELLANT:

You, and each of you, will pleace take notice, that the foregoing petition will be presented to the above entitled Court at the Court Room thereof in the City of San Francisco, California, at the opening of Court on Tuesday the 5th day of January, 1932, or as soon thereafter as counsel may be heard.

Dated December 29th, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Appellee.

ACCEPTANCE OF SERVICE

Due personal service of the foregoing petition and notice admitted and receipt of copies acknowledged this ..... day of December, 1931.

.....

Attorneys for Appellant.

Filed July 16, 1930.

C. R. Garlow, Clerk.

PLAINTIFF'S EXHIBIT TWO

THIS AGREEMENT, Made and entered into this twenty-fifth day of April, A. D. 1917, between LOUIS STADLER, GUSSIE STADLER, his wife, and LOUIS E. KAUFMAN, unmarried, of the City of Helena, in the County of Lewis and Clark, State of Montana, the parties of the first part, and EDWARD H. GALLIVAN and JAMES EDMUND O'CONNELL, of the same place, the parties of the second part, WITNESSES: That the said parties of the first part, in consideration of the covenants and agreements on the part of the said parties of the second part, hereinafter contained, agree to sell unto the said parties of the second part, all those certain lots, pieces or parcels of land situate, lying and being in the Townsite of the City of Helena, County of Lewis and Clark, State of Montana, particularly described as follows, to-wit:

Lots numbered Three (3) and Four (4) in Block number Thirty (30); also Lot number Forty-nine (49) in said block, excepting the West 20.7 feet thereof conveyed by deed to Charles J. Geier, said deed bearing date the 14th day of April, 1909, and recorded in the office of the County Clerk and Recorder of said County of Lewis and Clark on the 15th day of April,

1909, in Volume 59 of Deeds, page 509; also all that portion of Lots numbered Forty-seven (47) and Sixty (60) in said block, particularly described as follows: Beginning at a point in the North line of said Lot number Forty-nine (49) in said block, 42.3 feet Westerly from the Northeast corner of said Lot number Forty-nine (49); thence running Northerly 4 feet to a point; thence Easterly parallel to the said North line of said Lot number Forty-nine (49), 42.3 feet; thence Southerly 4 feet to the Northeast corner of said Lot number Forty-nine (49), the place of beginning; said lots and block being as numbered, designated and described on the McIntrye plat of said townsite on file in the office of said County Clerk and Recorder. This agreement is expressly made subject to that certain party wall agreement bearing date the 13th day of May, 1907, made and entered into between Louis Stadler, Mary Stadler, his wife, and Louis E. Kaufman, of the one part, and Mary Edwards of the other part.

The purchase price for said property is the sum of sixteen thousand dollars ($16,000.00), lawful money of the United States of America.

And the said parties of the second part, in consideration of the premises, agree to pay in lawful money of the United States of America, to the said parties of the first part, the said sum of sixteen thousand dollars ($16,000.00) in the instalments following, that is to say: the sum of four thousand dollars ($4000.00) cash

at or before the execution of this agreement, the receipt of which is hereby acknowledged; the sum of two thousand dollars ($2000.00) on or before the first day of May, 1918, and the sum of two thousand dollars ($2000.00) on or before the first day of May in each year thereafter until the said purchase price shall be fully paid, together with interest on said deferred payments at the rate of six per cent. per annum from May 1st, 1917, until paid, interest payable annually on May 1st in each year.

And the said parties of the second part agree to pay all state, county and city taxes and assessments of whatever nature which may become due upon the premises above described for the year 1917 and each year thereafter.

The said parties of the second part further agree to keep the improvements upon said premises insured against loss by fire in the sum of at least eight thousand six hundred and fifty dollars ($8650.00) in favor of the said parties of the first part as their interests may appear.

It is further understood and agreed that the said Louis Stadler and Louis E. Kaufman may occupy and retain the use, without charge, of that certain office now occupied by them in the building upon said premises until the deed hereinafter mentioned shall be delivered under the terms of this agreement.

The said parties of the first part will, cotemporaneously with the execution of this agreement, make,

sign and acknowledge a good and sufficient deed, for the conveying and assuring to the said parties of the second part the fee simple of the said premises, with usual covenants of warranty and free from encumbrance, which said deed shall be deposited, together with a duplicate original of this agreement, in escrow with the AMERICAN NATIONAL BANK of Helena, Montana, to be delivered to the said parties of the second part if they shall make payment of said purchases prices in the instalments and within the time and with the interest hereinabove specified, and shall in all respects comply with the terms of this agreement on their part. In case of default in the payment of any instalment of said purchase price, or of the interest to become due thereon, within the time in that behalf hereinabove specified, such default continuing for the space of six months, the said depositary shall return the said deed to the said parties of the first part, or their order, and the parties of the second part shall not thereafter have any right to purchase said property, or any part thereof, anything herein to the contrary notwithstanding, and this agreement shall constitute the instructions to said depositary as to the disposition of said deed in escrow.

And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties and that the said parties of the second part are to have posses-

sion of said described premises on or before the first day of May, 1917.

It is further understood and agreed that time is of the essence of this agreement, and that in the event of a failure to comply with the terms hereof, by the said parties of the second part, such failure continuing for a period of six months, the said parties of the first part shall be released from all obligation in law or equity to convey said property, or any part thereof, and said parties of the second part shall forfeit all right thereto and shall also forfeit as rent and as fixed, settled and liquidated damages, all sums of money paid by them under the terms of this agreement prior to such failure.

It is further understood and agreed between the parties to these presents, that if default be made in fulfilling this agreement, or any part thereof, on the part of the said parties of the second part, such default continuing for a period of six months, then and in such event the said parties of the first part, their heirs, executors, administrators or assigns, shall have the right to the immediate possession of said premises and each and every part and parcel thereof, and shall have full and ample right to proceed against the said parties of the second part and to remove them therefrom in the manner provided by law for the removal of persons forcibly entering into the possession of and unlawfully detaining any lands or other possessions.

IN WITNESS WHEREOF, the said parties have hereunto set their hands, the day and year herein first above written.

Louis Stadler
Gussie Stadler
Louis E. Kaufman
Edward H. Gallivan
James Edmund O'Connell

(on back)

$2000.00 Prin $720.00 Interest pd May 1-1918
$2000 Prin $115.00 Interest pd April 14-1919
Paid S & K $480.00 Interest pd 5/7/1919 to May 1 1919
2000 Prin $12.00 Interest pd 5/9/1919
Int paid May 3rd 1920 $360.00
Int paid May 6th 1921 360.00
$2000.00 Prin paid Sept 20th 1921
46.66 Int on $2000.00 May 1st 1921 to Sept 20 1921 leaving 1 year interest to be paid on $4000.00 from 5/1/21 to 5/1/22
Int. paid May 6th 1922—$240.00
$2000.00 Prin paid Jan. 15th 1923
$85.00 Int. paid on $2000.00 to Jan. 15th 1923
Balance due $2000.00 on principal and interest on same from May 1st-1922 to—
$2000.00 Prin paid May 4th 1923
$121.00 int paid May 4th 1923

(Indorsed on cover)
A G R E E M E N T
LOUIS STADLER, et al.,
with
EDWARD H. GALLIVAN, et al.
Dated April 25th, 1917
J. MILLER SMITH, Attorney.
Helena, Montana.

PLAINTIFF'S EXHIBIT THREE

Filed July 16, 1930.

C. R. Garlow, Clerk.

THIS INDENTURE MADE the 7th day of May, A. D. one thousand nine hundred and twenty-three, between LOUIS STADLER, GUSSIE STADLER, his wife, and LOUIS E. KAUFMAN (unmarried), of the City of Helena, County of Lewis and Clark, State of Montana, the parties of the first part, and JAMES EDMUND O'CONNELL, of the same place, the party of the second part, WITNESSETH: That the said parties of the first part, for and in consideration of the sum of Ten Dollars ($10.00), lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, convey, warrant and confirm unto the said party of the second part, and to his heirs and assigns, forever, the hereinafter described real estate situated in the Townsite of the City of Helena, County of Lewis and Clark, State of Montana, to-wit:

Lots numbered Three (3) and Four (4), in Block number Thirty (30); also Lot number Forty-nine (49) in said Block, excepting the west 20.7 feet thereof conveyed by deed to Charles J. Geier, said deed bearing date the 14th day of April, 1909, and recorded in the office of the County Clerk and Recorder of said County of Lewis and Clark on the 15th day of April,

1909, in Volume 59 of Deeds, page 509; also all that portion of Lots numbered Forty-seven (47) and Sixty (60) in said Block, particularly described as follows: Beginning at a point in the North line of said Lot number Forty-nine (49) in said Block, 42.3 feet westerly from the Northeast corner of said Lot number Forty-nine (49); thence running Northerly 4 feet to a point; thence Easterly parallel to the said North line of said Lot number Forty-nine (49), 42.3 feet; thence Southerly 4 feet to the Northeast corner of said Lot number Forty-nine (49), the place of beginning; said lots and block being as numbered, designated and described on the McIntyre plat of said townsite, on file in the office of the County Clerk and Recorder.

Also all the right, title and interest of the grantors in and to the party wall agreement, bearing date the 13th day of May, 1907, made and entered into between Louis Stadler, Mary Stadler, his then wife, and Louis E. Kaufman and Mary Edwards, together with any burdens of such agreement as well as the privileges appertaining thereto. This conveyance is also made subject to all State, County and City taxes and assessments levied against the premises, beginning with the year 1917, and which said assessments, levies, etc., the said party of the second part hereto assumes.

Together with all and singular the hereinbefore described premises together with all tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the reversion and rever-

sions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, right of dower and right of homestead, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in and to the said premises, and every part and parcel thereof, together with the appurtenances thereto belonging, to have and to hold all and singular the above mentioned and described premises unto the said party of the second part, and to his heirs and assigns, forever.

And the said parties of the first part and their heirs do hereby covenant that they will forever warrant and defend all right, title and interest in and to the said premises and the quiet and peaceable possession thereof, unto the said party of the second part, his heirs and assigns, against all acts and deeds of the said parties of the first part, and all and every person and persons whomsoever lawfully claiming or to claim the same.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first hereinbefore written.

Louis Stadler (SEAL)
Gussie Stadler (SEAL)
Louis E. Kaufman (SEAL)

Signed, Sealed and Delivered in the precence of
Annie M. Stewart

(Here are pasted six (6) Documentary Stamps in sum of $2.00 each)

State of Montana, County of Lewis and Clark—ss.

On this 7th day of May, in the year nineteen hundred and twenty-three, before me, Annie M. Stewart, a Notary Public for the State of Montana, personally appeared Louis Stadler, Gussie Stadler and Louis E. Kaufman (unmarried), known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year first above written.

Annie M. Stewart,

Notary Public for the State of Montana. Residing at Helena, Montana. My commission expires Dec. 17, 1923.

(Notarial Seal)

(Indorsed on back)

12017

WARRANTY DEED.

FROM

LOUIS STADLER, et al.,

TO

J. E. O'CONNELL.

Dated May 7, 1923.

State of Montana, County of Lewis and Clark—ss.

I hereby certify that the within instrument was filed in my office on the 8th day of May A. D. 1923 at

35 min. past 4 o'clock P. M. and recorded on page 419 of book 94 of Deeds Record of Lewis and Clark County, State of Montana.

A. J. Duncan
County Recorder.
By A. H. Cooney
Deputy.

J. E. O'Connell
Eddy Bakery.

United States of America, District of Montana—ss.

I, C. R. GARLOW, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the annexed and foregoing is a true and full copy of the original PLAINTIFF'S EXHIBIT NO. 2 and PLAINTIFF'S EXHIBIT NO. 3, in case No. 1399, Eddy's Steam Bakery, Inc. etc. vs. C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana, now remaining among the records of the said Court in my office. Said Exhibits contained on pages 6 both inc.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Helena, Montana, this 30th day of December, A. D. 1931.

C. R. GARLOW,
Clerk.
By H. L. ALLEN
Deputy Clerk.

(SEAL)

No. 6537

United States Circuit Court of Appeals

For the Ninth Circuit

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,

Appellant,

vs.

EDDY'S STEAM BAKERY, INC., a Corporation,

Appellee.

Brief of Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

T. B. WEIR
HARRY P. BENNETT
Attorneys for Appellee.

INDEX.

Page

I. ADDITIONAL STATEMENT.

1. O'Connell and Gallivan partners operating restaurant and bakery 1916 to 1918 3
2. Corporation formed 1918..... 3
3. *September* 1920 *Gallivan went out and took restaurant* 3
4. *January* 1, 1921, *O'Connell took out bakery* 3
5. *O'Connell had title to bakery* at all times 4
6. *O'Connell personally operated bakery* 1921 4
7. All purchases made by the individual 4
8. Bill-heads changed to show personal operation 4
9. Property taxes assessed to individual 4
10. Corporation transacted no business; had no income 5
11. *Court found corporation transacted no business; had no income*..... 6
12. Evidence to support court's finding 6

II. ARGUMENT.

1. Lawful to transact business in any lawful manner resulting in least tax 7

Page

2. *Judgment fully sustained by evidence* 7

3. *Judgment should not be disturbed if supported by substantial evidence* 7

4. Question of title of only probative value 7

5. Position of courts on this question 8

6. O'Connell at all times had title to bakery and no bill of sale necessary to transfer supplies, hence, on appellant's argument, judgment should be sustained..... 9

7. Plaintiff's complaint and theory below not based on question transfer, but on who entitled to income 10

III. SUMMARY.

1. Substantial evidence to support judgment, therefore should be sustained 11

IV. AUTHORITIES.

Lewis v. Lambros, 58 Mont. 555-560, 194, Pac. 152..... 10

Walker v. Railroad Co., 165 U. S. 593, 41 L. ed. 837-841..... 6

55 C. J. 535..... 10

5 Enc. Fed. Proc. 20..... 6

20 R. C. L. 274..... 6

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Appellee.

Brief of Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

T. B. WEIR
HARRY P. BENNETT
Attorneys for Appellee.

STATEMENT OF THE CASE

Inasmuch as this appeal presents the question of whether or not there is evidence to support the court's finding and judgment that Eddy's Steam Bakery, Inc., had no taxable income or profits for the year 1921, we deem it helpful to supplement appellant's statement of the case by reference to that evidence contained in the rcord.

By his 60 day letter dated February 9, 1926, (T. 8) the Commissioner of Internal Revenue made a deficiency assessment of income tax against the appellee corporation for the year 1921 of $3,037.41, and found an over-assessment for the year 1922 of $219.71, and thereafter the Collector, Rasmusson, demanded of the appellee corporation the payment of $2,817.70, with interest, which aggregate amount of $3,819.63 was on November 19, 1926, paid by appellee to the appellant Collector, under protest, and thereafter on March 6, 1929, appellee filed its claim of refund with the Collector (T. 15), which claim was denied by the Commissioner of Internal Revenue (T. 15, 21) July 12, 1929, and this action was commenced in the District Court of the United States for the District of Montana, July 29, 1929, (T. 21).

The trial was had to court below without jury and the court found for the appellee corporation and judgment was so entered in the sum of $3,819.63 February 11, 1931, (T. 73).

From 1910 E. H. Gallivan and J. E. O'Connell were copartners conducting a restaurant at Helena, Montana; in 1916 the copartnership also entered the bakery business at Helena, Montana, (Tr. 28). February 21, 1918, the appellee corporation was formed under the laws of Montana with the corporate name "O'Connell and Gallivan Company," to take over the partnership business in the restaurant and bakery, which it conducted until the latter part of the year 1920 (T. 2, 22, 28).

In September of 1920 Gallivan and O'Connell, who owned all the stock of the corporation (save one share held by O'Connell's brother), (T. 36, 37), apparently decided to end their business relationship, and O'Connell bought Gallivan's stock in the corporation (T. 63). There was then on September 27, 1920, a special meeting of the board of directors, at which Gallivan resigned his offices of President and Director of the corporation (T. 32), and with J. E. O'Connell then owning all the capital stock of the corporation (save one share held by each his brother and his wife) the directors resolved to sell the resturant business to J. E. O'Connell (T. 33), and thereafter in 1920 J. E. O'Connell as an individual sold the restaurant business to Gallivan (T. 30).

For the next 90 days the bakery business was continued to be owned and run by the corporation, and on January 1, 1921, the directors of the corporation met as a board and resolved to accept the "pro-

posal from Mr. J. E. O'Connell that he be allowed to purchase the assets, good will, trade name, etc., of the O'Connell & Gallivan Company, at book value as of December 31, 1920, and that he would assume any and all outstanding liabilities of the Company that existed at the time". (Tr. 36.) And on the same day the stockholders held a special meeting and ratified the "action of the Board of Directors in disposing of the assets of the corporation to Mr. J. E. O'Connell be confirmed." (Tr. 37, 38.) From that time forward during the year 1921 J. E. O'Connell individually conducted the bakery business (T. 28, 29). He personally held title to the bakery. The bakery was held during all this time under contract of sale and purchase running from Kaufman and Stadler to E. H. Gallivan and J. E. O'Connell as individuals (Plff. Ex. 2), which contract evenuated in deed from Kaufman and Stadler to J. E. O'Connell as an individual (Plff. Ex. 3). So the legal title to the bakery being in O'Connell individually there was no occasion for any deed of transfer by the corporation.

O'Connell, the individual, had new bill-heads printed and used in the business showing that he, the individual, was owning and conducting the business (T. 60, 64, Def's. Ex. 11 and 12).

Purchases were made in the name of J. E. O'Connell, the individual (T. 61).

Taxes were paid in the name of J. E. O'Connell, the individual (T. 61).

The public was advised by O'Connell of the change—"the only thing we knew how to do to inform the people because of the sale; that we were operating as an individual." (T. 61.)

O'Connell, the individual, reported the income from the bakery business in the year 1921 as his individual income for Federal Tax purposes, and paid the income tax. (T. 52, Def's. Ex. 6.)

No formal deed or bill of sale was delivered by the corporation to the individual.

O'Connell states the motive for the transfers was to run the business at a lower cost. (T. 30.)

In 1923 the corporate name was changed to Eddy's Steam Bakery, Inc. (T. 2, 22).

ARGUMENT

It is not conceivable that anyone can be condemned for legally avoiding taxes. The Revenue Act of 1921 imposed a greater tax upon a corporation in 1921 than upon an individual doing the same business. So that we cannot see how O'Connell owning all the stock of the corporation, or how the corporation, can be condemned as having undertaken an odious thing, when the individual took over the business. We think the court will accept this proposition upon its plain statement, and proceed to the merits.

JUDGMENT FULLY SUSTAINED BY THE EVIDENCE

The question presented by this appeal is not,—as appellant contends,—whether or not the court below erred in determining what weight should be given to the absence of formal transfer papers from the corporation to the individual, but whether or not there is evidence in the record to sustain the finding and judgment that *the corporation neither earned, nor received, nor acquired, nor was entitled to any income or profits whatsoever for or during the year 1921.*

The case was tried to the court without a jury, and the court's finding of the fact of no income or profits to the corporation cannot be disturbed on appeal if it is supported by substantial evidence.

> 20 R. C. L. 274, citing 14 State courts;
> 5 Enc. Fed. Proc., p. 20, citing 28 Federal decisions.

Brewer, J., in Walker v. Railroad Co 165 U. S. 593, 41 L. ed. 837-841, states the rule for overturning a verdict, thus: "When it appears that there was no real evidence in support of any essential fact."

The court below was not trying the question of whether or not title passed, or whether or not O'Connell surrendered his capital stock. The question was whether or not the corporation had—in the words of the Revenue Act—any "gains, profits and income derived from salaries, wages or compensation for person-

al service * * * or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property * * * growing out of the ownership or use of or interest in such property; * * * from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

The evidence on this point fully sustains the judgment. The action of the board of directors and stockholders as shown by the minutes (T. 35) clearly shows the purpose to take the corporation out of business. J. E. O'Connell, the President of the corporation, states: "The plaintiff corporation did not transact any business whatever in the year 1921." And he further states the corporation neither had, or received, nor was entitled to any income or profits for or in the year 1921; (T. 27); in 1921 I operated the Eddy Bakery as an individual by transfer of the assets of the Eddy Bakery, of the O'Connell and Gallivan Company to me as an individual. (T. 29). "I said I was operating as an individual." (T. 61).

This evidence is not contradicted and fully sustains the judgment.

QUESTION OF TITLE ONLY PROBATIVE

Appellant in his brief cites some 15 cases dealing with the effect of either *assignment of income* or

change and attempted change of operation of a business from corporation to individual stockholder, or from husband to wife. From these it is apparent that the Internal Revenue Department has been endeavoring for years to establish as a rule of *substantive law,* the proposition that title to the corpus establishes title to the income and taxability, but the courts have refused to accept that view. In none of the cases cited is the question of title to the corpus given more than *probative* value.

In eleven of appellant's cases, viz. Ward v. Commissioner, 22 B. T. A. 1108, brief page 27, Wehe v. McLaughlin, 30 F. (2d) 217, brief page 14, Mitchel v. Bowers, 15 F. (2d) 287, brief page 27, Lucas v. Earl, 281 U. S. 111, 74 L. ed. 73, brief page 27, and Leydig v. Commissioner, 43 F. (2d) 494, brief page 27, Alexander S. Brown, 3 B. T. A. 826, brief page 27, Edward J. Luce, 18 B. T. A. 923, brief page 27, L. Brackett Bishop, 19 B. T. A. 1108, brief page 27, Arthur F. Hall, 17 B. T. A. 752, brief page 27, Ward v. Commissioner, 22 B. T. A. 352, brief page 27, and James M. Stubs, Jr., 22 B. T. A. 1386, brief page 27, the effect of the contract considered was to pass title to income *after* it had accrued to the assignor, and *therefore the income was taxable in the assignor before the contract took effect upon it.*

In the Klausner case, 25 F. (2d) 608, brief page 14, the question was whether the income was derived from sale of corporate stock, or liquidation dividend.

The Brunton case, 42 F. (2d) 81, brief page 19, raises only the question of when the sale took effect.

The Capps case, 15 F. (2d) 528, brief page 21, upon which appellant seems to rely, does not touch the question at all. It holds only that the assets of a corporation may be followed into the hands of a transferee to collect tax due from the corporation.

The case Rice-Sturtevant Automobile Co. v. Commissioner, 6 B. T. A. 793, brief page 20, follows the rule for which we contend, viz: that the question of title is only of probative value.

O'CONNELL AT ALL TIMES HAS HELD LEGAL TITLE TO BAKERY

We, of course, have a different situation here than that where the income in question is the increment of the corpus of the property, such as interest from bonds, oil from lands, rental from lands, etc. There the income must first accrue to the owner of the corpus, and, of course, is taxable to him, though there be an assignment. Such assignment could only take effect after the income had come into existence.

Here there is no increment, the income is from selling bread made in the bakery.

And besides *O'Connell has title to the bakery,* the corporation has no title to the bakery, never did have

(Plff's. Exs. 2 and 3). Appellant in his brief urges the proposition that the income follows the corpus, but appellant wholly overlooks the fact that O"Connell, the individual, has title to the bakery.

There is no evidence that this income is the result of any flour, sugar or other bakery supplies on hand December 31, 1920. And as to such personal property, no writing or bill of sale was necessary to transfer title. The mere taking possession by the individual was sufficient.

> "A bill of sale is not necessary to make a valid sale of personality. In fact, it is a matter of common knowledge that the vast bulk of sales of personal property is not accompanied by any written evidence thereof."
>
> Lewis v. Lambros, 58 Mont. 555-560, 194 Pac. 152; 55 C. J. 535.

THEORY IN COURT BELOW

Appellant assumes the erroneous position that the case was tried below on the question of title.

By paragraph IX of the complaint (T. 5) it is charged that the tax assessment

> "is wrongful, unlawful and void, in this that, the plaintiff transacted no business whatever during the calendar year 1921, or any part thereof, and that this plaintiff neither earned, nor received, nor acquired, nor was entitled to any income or

profits whatsoever for or during said calendar year 1921."

It was upon this theory the case was tried below and judgment entered.

SUMMARY

We, therefore, have title to the bakery in O'Connell, and we have the finding and judgment of the trial court to the effect that the corporation had no income in the year 1921, and this finding and judgment being supported by substantial evidence, the judgment must be affirmed.

Respectfully submitted,

T. B. WEIR
HARRY P. BENNETT
Attorneys for Appellee.
(Helena, Montana.)

December 1931.

No. 6537

United States Circuit Court of Appeals

For the Ninth Circuit

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,

Appellant,

vs.

EDDY'S STEAM BAKERY, INC., a Corporation,

Appellee.

Supplemental Brief of Appellant

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

WELLINGTON D. RANKIN,
United States Attorney.
ARTHUR P. ACHER,
Assistant U. S. Attorney.
SAM D. GOZA, Jr.,
Assistant U. S. Attorney.
Attorneys for Appellant.

Filed.....1932.

.....Clerk.

INDEX

	Page
Argument	2
The Motion Raised a Question of Law for Review as to the Sufficiency of the Evidence to Support a Judgment	3
The Sufficiency of the Facts Found to Support the Judgment May Be Reviewed by This Court	5
Conclusion	9
Petition for Writ of Certiorari for Diminution of Record	10
Minutes of the District Court at the Trial of the Cause	14
Stipulation	15
Order	16
Clerk's Certificate	17
Acceptance of Service	18

CASES CITED

Clara B. Parker, et al. v. A. F. St. Sure, (C. C. A. 9) 53 F. (2d) 706, 709	6
First Nat'l. Bank of San Rafael v. Philippine Refining Corp., (C. C. A. 9) 51 F. (2d) 218, 222	5, 8
Grainger Bros. Co. v. G. Amsinck & Co. (C. C. A. 8) 15 F. (2d) 329	5

	Page
Insurance Co. v. Boon, 95 U. S. 117, 126	6
Jennisons v. Leonard, 21 Wall 302, 307	6
Maryland Casualty Co. v. Jones, 279 U. S. 792, 795	3
People's Bank v. International Finance Corporation, (C. C. A. 4) 30 F. (2d) 46	5
Tyre & Spring Works Co. v. Spalding, 116 U. S. 541	6
United States v. Adams, 6 Wall. 101	9
Zurich General Acc. & L. Ins. Co. v. Mid-Continent P. Corp., (C. C. A. 10) 43 F. (2d), 355, 357	4

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Appellee.

Supplemental Brief of Appellant

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

WELLINGTON D. RANKIN,
United States Attorney.
ARTHUR P. ACHER,
Assistant U. S. Attorney.
SAM D. GOZA, Jr.,
Assistant U. S. Attorney.

Attorneys for Appellant.

ARGUMENT

The question is presented as to the authority of this Court to review this case on the record as filed. A petition for writ of certiorari for diminution of the record has been filed. For the convenience of the court the petition is printed and made a part of this brief (pages 10-12).

It will be noted that in the transcript of record in this case, it appears that at the conclusion of the plaintiff's case in the court below the following proceedings were had:

> "Thereupon, the defendant moved for judgment in its favor and against the plaintiff upon the ground that the evidence was insufficient to support judgment for the plaintiff, motion denied by the Court and exception of the defendant noted." (Tr. 49.)

By the petition for writ of certiorari for diminution of the record we have asked that the transcript be supplemented by the addition of the minutes of the Court showing the record at the trial of this cause so that the record may be amended to show that the foregoing motion was in fact made at the conclusion of all of the evidence in the case. From the Clerk's records it will be noted that a stipulation waiving trial by jury having been filed:

> "Thereupon, J. E. O'Connell and Hugh D. Galusha were sworn and examined as witnesses for plaintiff, and certain documentary evidence

was introduced, whereupon plaintiff rested. Thereupon A. B. Atwater was sworn and examined as a witness for defendant, and certain documentary evidence was introduced, whereupon defendant rested. Thereupon J. E. O'Connell was recalled in rebuttal and certain documentary evidence was introduced, whereupon plaintiff rested and the evidence closed. *Thereupon defendant moved the court to order judgment entered herein in his favor and against the plaintiff, which motion was resisted by the plaintiff, whereupon, court ordered that said motion be denied, the exception of defendant to the ruling of the court being duly noted.*" (Italics ours) (This brief, page 14).

Counsel for the appellee have consented to the amendment of the record to show that the motion was made at the conclusion of all of the evidence in the case, to the end that the record on appeal may conform to the truth (this brief page 18).

THE MOTION RAISED A QUESTION OF LAW FOR REVIEW AS TO THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT A JUDGMENT.

This motion for judgment which corresponded to a motion for a directed verdict presented a question of law as to whether the evidence was sufficient in law to sustain a judgment which is subject to review. Thus

in the case of *Maryland Casualty Co. v. Jones,* 279 U. S. 792, 795, the Court said:

> "Here the rulings of the court to which the defendant excepted and as to which it assigned errors, plainly related to matters of law. The motion for nonsuit—which corresponded to a motion for a directed verdict—presented the question whether the evidence, with every inference of fact that might be drawn from it in favor of the plaintiff, was sufficient in matter of law to sustain a judgment. See Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 38."

In the case of *Zurich General Acc. & L. Ins. Co. v. Mid-Continent P. Corp.* (C. C. A. 10) 43 F. (2d) 355;

> "Section 773 provides that a finding of the court upon the facts in a cause tried without a jury shall have the same effect as the verdict of a jury. Section 879 forbids a reversal on a writ of error for any error of fact. But questions of law are open to review, and it was a question of law whether there was substantial evidence to uphold the finding of the trial court. It was needful for the appellant to request or move for a declaration of law, or take an equivalent step in the trial court. Wear v. Imperial Window Glass Co. (C. C. A.) 224 F. 60. But the plaintiff moved for a judgment upon the evidence, the motion was denied, and an exception was reserved. And that motion raised a question of law for review as to the sufficiency of the evidence. Maryland Casualty Co. v. Jones, 279 U. S. 792, 49 S. Ct. 484, 73 L. Ed. 960; United States Fidelity & Guaranty Co. v. Board of Commissioners (C. C. A.) 145 F.

144; Pennok Oil Co. v. Roxana Petroleum Co. (C. C. A.) 289 F. 416."

Also see *People's Bank v. International Finance Corporation,* (C. C. A. 4) 30 F. (2d) 46; *Grainger Bros. Co. v. G. Amsinck & Co.* (C. C. A. 8) 15 F. (2d) 329, *First Nat'l Bank of San Rafael v. Philippine Refining Corp.,* (C. C. A. 9) 51 F. (2d) 218.

THE SUFFICIENCY OF THE FACTS FOUND TO SUPPORT THE JUDGMENT MAY BE REVIEWED BY THIS COURT.

Section 875, Title 28 U. S. Codes provides:

> "When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section 773 of this title, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Under this section if the trial court has made special findings the question of law of whether or not such findings support the judgment is subject to review,

even without a bill of exceptions, *Tyre & Spring Works Co. v. Spalding,* 116 U. S. 541; *Jennisons v. Leonard,* 21 Wall 302, 307.

The district court has made an order nunc pro tunc as of February 5, 1931, designating and entitling its opinion as its special finding (this brief page 16). This court has held that the court may adopt its opinion as its findings of fact and conclusions of law and that the opinion thereupon becomes a part of the record, *Clara B. Parker, et al. v. A. F. St. Sure,* (C. C. A. 9) 53 F. (2d) 706, 709. In that case this court said:

> "In these cases the district judge filed an opinion and adopted the same as his findings of fact and conclusions of law. We see no objection to this course. Until the opinion is adopted by the court as its findings of fact and conclusions of law, it is not a part of the record."

It is submitted that the district court had authority to make the order nunc pro tunc as of February 5, 1931, designating its decision as its special findings. The order does not purport to allow an exception where one was in fact not taken but is a correction of the record in strict accordance with the truth. The application for the order was made upon the authority of the case of *Insurance Co. v. Boon,* 95 U. S. 117, 126. In that case the court ordered special findings to be signed and filed nunc pro tunc conformably to the opinion theretofore filed. The Court said:

"Generally, it may be admitted that judgments cannot be amended after the term at which they were rendered, except as to defects or matters of form; *but every court of record has power to amend its record, so as to make them conform to and exhibit the truth.* Ordinarily there must be something to amend by; but that may be the judge's minutes or notes, not themselves records, or anything that satisfactorily shows what the truth was. Within these rules, we think, was the order made at September Term, that the special finding of facts and conclusions of law be signed by the judges and allowed, conformably to the opinion of the court theretofore filed, and that it, together with the order, should be filed nunc pro tunc as of April Term, and made part of the record. It was but an amendment or correction of form, the form of the finding, not of its substance, and there was enough to amend by. The opinion, which was filed concurrently with the entry of the judgment, contained substantially, almost literally, the same statement of facts, and relied upon it as the foundation of the judgment given. True, that opinion is no part of the record, any more than are a judge's minutes; but it was a guide to the amendment made, and it seems altogether probable it was intended to be itself a special finding of the facts. *The order of September, 1874 recites that the court had at April Term filed, announced, and declared their findings of facts, with their conclusions of law thereupon, which findings and conclusions were embodied in the opinion of the court announced and filed in the case. All that was wanting to make it a sufficient special finding was that it was not entitled "finding of facts."* The amendment or correction, therefore, contradicts nothing in the record as made at April

> Term, and it is in strict accordance with the truth. We conclude, then, that the order of September Term was within the discretion of the court, and that by it the special findings returned became a part of the record of the cause, *and that the judgment founded upon it is subject to review in this court without any bill of exceptions.*" (Italics ours.)

This court in speaking of the above case said in *First Nat. Bank of San Rafeal v. Philippine Refining Corp.* (C. C. A. 9) 51 F. (2d) 218, 222:

> "In Insurance Co. v. Boon, 95 U. S. 117, 126, 24 L. Ed. 395, the Supreme Court had occasion to consider the right of a Circuit Court at a subsequent term to make findings of fact and conclusions of law to be filed nunc pro tunc as of the previous term. It was held that, where the trial court in the previous term had filed an opinion of the court, and where the finding was but an amendment or correction in form of the finding contained in the opinion and was not of its substance, there is enough to amend by."

It is conceded that the objection could perhaps be raised that notwithstanding the fact that the District Court has authority to make an order nunc pro tunc, denominating its decision as its special findings, it would not have authority in this case without leave of the appellate court, although it is submitted that being nunc pro tunc it would relate back to the date when it should have been made, 42 C. J. 532. If the court is of the opinion that such an order could properly be

made, but not after an appeal is perfected, we respectfully request that the Circuit Court remand the cause to the District Court with permission to make such an order and a new application therefore will be made, *United States v. Adams,* 6 Wall. 101.

CONCLUSION

The petition for Writ of Certiorari is prayed for to correct the record and show that a motion for judgment was made by defendant and appellant at the close of all the evidence, and the appellee has consented to the granting of such petition. Being so corrected the court may consider the sufficiency of the evidence to support the judgment.

A petition for Writ of Certiorari or other appropriate writ is also prayed for to include the order of the district court designating its decision as special findings, or permitting the district court to make such an order, whereupon the circuit court may consider the sufficiency of the findings of the trial court to support the judgment.

Respectfully submitted,

WELLINGTON D. RANKIN,
United States Attorney.
ARTHUR P. ACHER,
Assistant U. S. Attorney.
SAM D. GOZA, Jr.,
Assistant U. S. Attorney.
Attorneys for Appellant.

No. 6537

(TITLE OF COURT AND CAUSE)

PETITION FOR WRIT OF CERTIORARI FOR DIMINUTION OF RECORD

Comes now the appellant and respectfully represents:

1. That in the oral argument of the above entitled cause before the above entitled Court on January 5, 1932, the question was raised as to the power of the Court to consider the sufficiency of the evidence to support the judgment by reason of the absence of a motion for judgment in its favor by defendant and appellant in the trial court at the close of all the evidence and the question of the authority of the Court to consider the sufficiency of the facts found to support the judgment for want of special findings.

2. That these questions were raised for the first time at the time of oral argument.

3. That from an examination of the record of the Clerk of the United States District Court wherein the case was tried, it appears in the minutes of the Court with respect to the trial of the case that a motion by the defendant and appellant for judgment upon the ground that the evidence was insufficient to support a judgment for the plaintiff and appellee was duly

made, denied and an exception noted at the conclusion of all of the testimony and not at the close of the plaintiff's case as stated in the transcript of record herein.

4. That this defect in the record on appeal was not noted until at the time of the oral argument herein.

5. That said motion is incorporated in the Bill of Exceptions herein, but through inadvertance appears at the end of plaintiff's case, whereas in truth and in fact it should appear at the conclusion of all of the evidence in the case.

6. That the plaintiff and appellee in the judgment entered herein has treated the the Decision of the Court as its special findings, and they were so considered by appellant and the trial Court; that the District Court has entered in said Court an order nunc pro tunc as of February 5, 1931, to the effect that its opinion was adopted as its findings of fact and conclusions of law herein;

7. That annexed hereto are respectively a certified copy of the minute entry of the proceedings at the trial of this cause in the District Court; the stipulation waiving notice and the order filed in the District Court on January 26, 1932, hereinbefore mentioned.

8. That to the end that the record on appeal may conform to the truth these corrections in form should be made.

WHEREFORE, petitioner prays:

(1.) That a Writ of Certiorari or other appropriate writ be granted by this Court for a diminution of the record in this cause to include the Minutes of the District Court showing the proceedings at the trial of this cause and that a motion for Judgment in favor of the defendant and appellant was made at the conclusion of the trial, that said motion was denied and an exception noted, and that the bill of exceptions and transcript of record be corrected accordingly;

(2.) That a Writ of Certiorari or other appropriate writ be granted by this Court to include the order of the District Court designating its written opinion as its special findings, or if the Court is of the opinion that the District Court is without jurisdiction to make such order that the case be remanded to said District Court with permission to make such order.

C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana,

Appellant.

WELLINGTON D. RANKIN,
United States Attorney.

SAM D. GOZA, Jr.,

ARTHUR P. ACHER,
Assistant U. S. Attorneys.

Attorneys for Appellant.

United States of America, District of Montana—ss.

Arthur P. Acher, being first duly sworn, deposes and says:

That he is one of the attorneys for the Appellant, C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana in the foregoing cause, that he has read the foregoing petition and knows the contents thereof and the matters and things therein stated are true of his own knowledge.

ARTHUR P. ACHER,

Subscribed and sworn to before me this 26th day of January, 1932.

MARJORIE McLEOD,

Notary Public for the State of Montana, Residing at Helena, Montana. My commission expires March 31st, 1934.

In the
District Court of the United States
District of Montana

No. 1399, Eddy Steam Bakery vs. C. A. Rasmusson, Collector.

This cause came on regularly for trial this day, Mr. T. B. Weir appearing for the plaintiff, and Mr. W. D. Rankin, U. S. Attorney, and Mr. A. P. Acher, Assistant U. S. Attorney, appearing for defendant. Thereupon, on motion of Mr. Rankin, court ordered that Mr. John R. Wheeler, General Counsel Bureau of Internal Revenue, be admitted to practice for the purposes of this case and his name entered as associate counsel for defendant. Thereupon, a stipulation waiving trial by jury was duly filed herein. Thereupon J. E. O'Connell and Hugh D. Galusha were sworn and examined as witnesses for plaintiff, and certain documentary evidence was introduced, whereupon plaintiff rested. Thereupon A. B. Atwater was sworn and examined as a witness for defendant, and certain documentary evidence was introduced, whereupon defendant rested. Thereupon J. E. O'Connell was recalled in rebuttal and certain documentary evidence was introduced, whereupon plaintiff rested and the evidence closed. Thereupon defendant moved the court to order judgment entered herein in his favor and against the plaintiff, which motion was resisted by the plaintiff, whereupon, court ordered that said motion be denied, the exception of defendant to the ruling of the court being duly noted. Thereupon, the cause was submitted to the court and taken under advisement, each side being granted five days for briefs.

Entered in open court July 16, 1930.

C. R. GARLOW, *Clerk.*

United States District Court
For the District of Montana,
Helena Division

EDDY'S STEAM BAKERY, INC., a Corporation,
Plaintiff,

vs.

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,
Defendant.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, acting by and through their respective counsel, that the matter of the amendment of the record to denominate and entitle the Court's decision entered herein on February 5, 1931, its Special Findings of Fact and Conclusions of Law may be submitted to the Court without further notice.

Dated this 25th day of January, 1932.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Plaintiff.
WELLINGTON D. RANKIN,
United States Attorney.
ARTHUR P. ACHER,
Assistant U. S. Attorney,
Attorneys for Defendant.

Filed January 26, 1932.

United States District Court
For the District of Montana,
Helena Division

EDDY'S STEAM BAKERY, INC., a Corporation,
Plaintiff,

vs.

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,
Defendant.

ORDER

On February 5, 1931, the District Court of the United States for the District of Montana, in the above-entitled cause announced and declared its findings of fact and conclusions of law, which said findings of fact and conclusions of law were embodied in the opinion of the court filed on said date designed and intended by said District Court as its special findings of fact and conclusions of law although not so entitled.

NOW, THEREFORE, the parties hereto having stipulated that this matter may be submitted without further notice, upon application of the defendant and appellant, it is ordered that the decision entered herein on the 5th day of February, 1931, be and the same is hereby adopted by the court as its Special Findings of Fact and Conclusions of Law, that it be so entitled and considered, and that this order be entered nunc pro tunc as of date February 5, 1931.

BOURQUIN, *Judge.*

Filed January 26, 1932.

CLERK'S CERTIFICATE

United States of America, District of Montana—ss.

I, C. R. GARLOW, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the annexed and foregoing is a true and full copy of the original minute entry of proceedings at trial on July 16, 1930, stipulation and order filed January 26, 1932, in case No. 1399, Eddy Steam Bakery, Inc., a corporation, Plaintiff vs. C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana, defendant now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Helena, Montana, this 26th day of January, A. D. 1932.

SEAL. C. R. GARLOW, Clerk.

By G. DEAN KRANICH, Deputy Clerk.

ACCEPTANCE OF SERVICE

Due personal service of the foregoing petition for Writ of Certiorari for Diminution of the record admitted and receipt of copy acknowledged this 27th day of January, 1932.

The appellee Eddy's Steam Bakery, Inc., hereby consents to the granting of said petition for Writ of Certiorari to supplement the transcript of record to show that a motion for Judgment in favor of the defendant and appellant was made at the close of all of the evidence in the case rather than at the close of Plaintiff's case, and consents to the submission of the petition in its other aspects on briefs to be filed without oral argument.

Dated this 27th day of January, 1932.

T. B. WEIR,
HARRY P. BENNETT,

Attorneys for Appellee.

No. 6537

United States Circuit Court of Appeals

For the Ninth Circuit

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,

Appellant,

vs.

EDDY'S STEAM BAKERY, INC., a Corporation,

Appellee.

Supplemental Brief of Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

T. B. WEIR,
HARRY P. BENNETT,
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INDEX.

Page

STATEMENT:

1. This Court on oral argument granted parties time for supplemental briefs on jurisdiction to review any fact question in this case 2
2. Appellant seeks diminution record for two purposes:
   (a) Raise point of sufficiency of evidence on its motion for judgment..... 2
   (b) Have trial court adopt opinion as special findings under Sec. 875 Title 28 U. S. C. A..... 2

ARGUMENT:

1. No assignment of error or plain error under Rule 24 to authorize review..... 3-5
2. Trial Court without jurisdiction to make order adopting opinion as special findings.... 3
   (a) Record discloses general finding was made on the trial.....3-14
   (b) After term or after appeal jurisdiction trial court over cause lost..... 3-6
   (c) Errors that may be corrected after term 6

Page

3. Case made by plaintiff amply sufficient against defendant's motion for judgment, or demurrer to evidence 4-19

4. If special findings had been made in language of the opinion, they would support judgment to at least $3,000.00 4-21

5. History of appellate procedure in law cases tried to court with jury waived 5

6. Case Aetna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395, never followed by Supreme Court 12

7. Procedure suggested is trap, depriving litigants of substantial rights, because deprives plaintiff of right of review of sufficiency of such special findings adopted after trial court has lost jurisdiction to settle bill of exceptions 16

QUESTIONS PUT BY COURT ON ORAL ARGUMENT:

1. Plaintiff and appellee maintained but one theory of case throughout 25

Page

2. Record does not justify statement appellant's brief page 8 suggesting appellee paid salary 26
SUMMARY: 28

CASES CITED:

Aetna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395 6-12-15
In Re Bills of Exceptions, 37 Fed. (2d) 849..... 6-9
Delaware L. & W. R. Co. v. Kutter, 147 Fed. 51 20
Dickson v. Bank, 83 U. S. 258, 21 L. ed. 278..... 7
Exporters v. Butterworth, 258 U. S. 365, 66 L. ed. 663 9
Flanders v. Tweed, 9 Wall. 425, 19 L. ed. 678.... 6-20
Fleischmann v. Forsberg, 270 U. S. 350, 70 L. ed. 624 7-10
Garwood v. Scheiber, 246 Fed. 74..... 20
Grayson v. Lynch, 164 U. S. 468, 41 L. ed. 230 11
Humphreys v. Bank, 75 Fed. 852.....5-16
Lehnen v. Dickson, 148 U. S. 71, 37 L. ed. 373 11
Martinton v. Fairbanks, 112 U. S. 67, 28 L. ed. 862 6-20
Maryland Casualty Co. v. Jones, 279 U. S. 792, 73 L. ed. 960.....4-20

Page

St. Louis v. Western Union Telg. Co., 166 U. S. 388, 41 L. ed. 1044 11
U. S. v. King, 7 How. 833, 12 L. ed. 934 12
U. S. v. Sioux City S. Y. Co., 167 Fed. 126 10
Wear v. Imperial, etc. Co., 224 Fed. 60-63 (8th) 19
Wilson v. Merchants L. & T. Co., 183 U. S. 121, 46 L. ed. 113 11
York v. Washburn, 129 Fed. 564 11
Cyc. of Federal Proc., Vol. 6, page 640 11
U. S. C. A. Title 28, Secs. 773 and 875 2-3-6-10
U. S. C. A. Title 28, Sec. 879 19

No. 6537

United States Circuit Court of Appeals

For the Ninth Circuit

C. A. RASMUSSON, as Collector of Internal Revenue for the District of Montana,

Appellant,

vs.

EDDY'S STEAM BAKERY, INC., a Corporation,

Appellee.

Supplemental Brief of Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Appellee.
(Helena, Montana.)

STATEMENT

Upon conclusion of arguments in this case before this Court the parties were by the Court given time to submit briefs on the question whether or not this Court could consider the question of *sufficiency of the findings to support the judgment* in view of the fact that no special findings appeared in the record, under Sections 773 and 875 Title 28, U. S. C. A., dealing with trial by court without jury, and special findings as condition of review of fact questions.

Appellant now asks diminution of the record, first, to correct the error in placing in the printed record defendant's motion for judgment at close of plaintiff's case, when the motion was actually made at close of all the evidence. This is a mere clerical error, and appellee, of course, consents that the record should be so corrected.

By its motion for diminution of record appellant also seeks to add to the record in this Court the order of the District Court made and filed in the District Court, January 26, 1932, that

> "the decision entered herein on the 5th day of February, 1931, be and the same is hereby adopted by the Court as its Special Findings of Fact and Conclusions of Law, that it be so entitled and considered, and that this order be entered nunc pro tunc as of date February 5, 1931."

ARGUMENT

These supplemental proceedings can avail appellant nothing.

First, appellant has not assigned error upon either the ruling of the trial Court on his motion for judgment at the close of the evidence, nor upon the sufficiency of the findings to support the judgment.

Second, there is no such "plain error not assigned" as the Court will notice without assignment under Rule 24.

Third, trial court made general finding on the trial (T. 73) and after the appeal the cause was so far moved out of the trial court as to divest it of authority to make the order of January 26, 1932, (Appellant's Supp. Brief, p. 16) adopting its decision as the special findings of fact referred to in Section 875, Title 28 U. S. C. A. The fact statements in the decision were neither adopted, nor designated, nor intended by the trial court as the special findings referred to in the Section 875, at any time prior to the appeal or within the term, and however much the trial court may have intended the fact statements in the decision as reason for its conclusions of law, nevertheless no request was made by the litigants for special findings under Section 875 as grounds for review in this Court, and the recitation of facts in decision were not intended by the trial court as compliance with that section, and the

trial judge does not now so state. To adopt the decision as findings under the Section would call for a *new and additional adjudication* on the part of the trial court, *not a correction of the record to disclose an adjudication had within the term or prior to loss of jurisdiction by the appeal.*

Fourth, in view of the record there is no room to urge upon the Court, that "with every inference of fact that might be drawn from it (the evidence) in favor of the plaintiff" the evidence was insufficient in matter of law to sustain a judgment for plaintiff, which is the measure specified by the Supreme Court in Maryland Casualty Co. vs. Jones, 279 U. S. 792, 73 L. ed. 960, cited in appellant's supplemental brief page 4. And this Court's jurisdiction to review the evidence is confined to the consideration of error in the trial Court's ruling on this motion.

Fifth, if the decision could be considered as findings, and if error had been specified, the review here would be only of the question *whether the facts found are sufficient to support the judgment and not whether the evidence supports the findings,* and the fact statements of the decision support the judgment on the question of who owned the income from the bakery business and $3,000.00 of plaintiff's claim to judgment.

NO ASSIGNMENT OF ERROR AND NO PLAIN ERROR THAT COURT MAY CONSIDER WITHOUT ASSIGNMENT.

Appellant made no attempt to assign error as to the sufficiency of findings. Neither Appellant's assignment I nor can any other of the assignments of error be construed as referring to the trial Court's ruling on defendant's motion for judgment. Assignment No. I is directed to the judgment ordered by the Court.

Exclude the Court's decision and we take it that there can be no claim that the record presents any "plain error" prejudicial to defendant, such as the Court might consider under subdivision 4 of Rule 24.

If we could consider the decision as findings, certainly that would add to the record nothing from which the Court sould say a "plain" error was presented,—an error so obvious that the Court would consider it as a matter of course and without assignment.

Certainly the error cannot be "plain" if to consider it at all would be necessary to remand the cause for special findings.

HISTORY OF APPELLATE PROCEDURE IN LAW CASES TRIED TO COURT WITH JURY WAIVED.

Taft, J., in Humphreys v. Bank, 75 Fed. 852-855.

decided in 1896, furnishes a schedule of questions of fact and questions of law that may be reviewed in cases tried under these statutes (Secs. 773 and 875, Title 28 U. S. C. A.) and the method of raising those questions on appeal.

These statutes were introduced in 1865, to cure defects in procedure theretofore under the common law, and the former procedure as well as the changes resulting from the legislation is discussed at length in

> Flanders v. Tweed, 9 Wall. 425, 19 L. ed. 678;
> Martinton v. Fairbanks, 112 U. S. 67, 28 L. ed. 862.

And the leading cases dealing with errors that may be corrected by the trial court after it has lost jurisdiction of the cause proper are reviewed in each,

> In Re Bills of Exceptions, 37 Fed. (2d) 849, (6th Circuit);
> Aetna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395, see especially dissenting opinion for review of cases.

AFTER THE TERM AND AFTER APPEAL PERFECTED THE TRIAL COURT HAS NO JURISDICTION TO MAKE AN ORDER ADOPTING HIS DECISION AS FINDINGS OF FACT.

The question presented is of much more importance

than the instant case. It involves procedure in all future cases tried to the Court in this district. If this Court shall approve the procedure here undertaken, then in future the decisions of the trial judge becomes a part of the record on appeal subject to review, and all that need be to accomplish this result is either, that the trial judge label the decision "Special Findings," or that, within the term, or after the term and appeal perfected, as here, the trial judge make an order to the effect that the decision was intended as special findings and through clerical error it was not so labeled. This would be an innovation in our procedure.

Beginning with the enactment of this statute on special findings in 1865 we have an unbroken line (unless the Boon case is contra) of decisions by the Supreme Court refusing to accept the trial court decision or opinion as a compliance with the statute.

> Dickson v. Bank, 83 U. S. 258, 21 L. ed. 278; Fleischmann v. Forsberg, 270 U. S. 350, 70 L. ed. 624-629.

The reason running through all these cases, is not the technical one of how the thing is "labeled," but is that *a compliance with the statute requires a finding of every ultimate fact necessary to sustain the judgment, and that upon examination of the opinion it is apparent the trial judge did not have in mind a compliance with the statute, because the decision makes no find-*

ing whatever upon contested facts so obviously necessary to the support of the judgment, and that notwithstanding the trial judge has recited or referred to some of the more closely contested facts in giving reasons for his conclusions of law, there are other contested fact questions in the case so obviously necessary to the judgment that it is not within reason the trial judge could have overlooked them or deliberately failed to find on them, if he had intended the decision as special findings under the statute.

Take the instant case. It is for money had and received; by its complaint, plaintiff claims $3,819.63 (paragraph IV T. 3); the answer puts this amount in issue (paragraph III T. 22); on the trial the parties admitted the figure $3819.63 was correct, and judgment is given for $3,819.63 with interest from November 19, 1926, according to the prayer of the complaint, and yet in the trial court's decision (T. 65), though the action is for money had and received, there is no finding of the amount due. The mere casual way in which the decision refers to this figure "some $3,000 income taxes" (T. 66) indicates that in preparing the decision the judge had not in mind "special findings" under the statute but *reasons* for his conclusions.

This proceeding is not only contrary to long established procedure, but would actually deprive the litigants of their plain rights.

For instance, in this case, no special findings were requested; by the well established rule the court's decision is no part of the record; there is no right or duty of the litigant to make a record of exceptions to any matter in the decision. And yet, if after the appeal and time for bill of exceptions has expired.

Re Bills of Exceptions, 37 Fed. (2d) 849,

the trial judge may make this order upon any ground whatsoever adopting the opinion as "special findings," *the litigant is deprived of his right to object and except to those findings* (for deficiencies or otherwise) *and deprived of his right to preserve his objections and exceptions for review. The only way such objections and exceptions may be preserved for review is by bill of exceptions, and the time has long since passed (by lapse of the term and by the appeal) when the Court had any authority to settle a bill of exceptions.*

Exporters v. Butterworth, 258 U. S. 365, 66 L. ed. 663. And the rule that the trial court may correct clerical errors to make the record speak the truth does not imply that jurisdiction over the cause is by that rule preserved or restored to the trial judge to adjudicate or settle a bill of exceptions, even with regard to the act of making the changes.

Were the rule otherwise, the litigant would never know when he had the whole record up on appeal. If the record could be added to in this manner, by the same reasoning it can be changed and added to over

and over again until the expiration of the time for rehearing in the appellate court.

The trial court's opinion is not an order or adjudication. The making of findings specified in the statute, Section 875 Title 28 U. S. C. A., contemplates a judicial act of the court, an order which becomes part of the record, made especially for use upon appeal. Confessedly no such order was made in this case. The court did recite certain facts in the opinion, in the mind of the court, justifying his general finding, conclusions of law and judgment order, but this was no compliance with the statute.

> "The opinion of the trial judge, dealing generally with the issues of law and fact and giving the reasons for his conclusions, is not a special finding of facts within the meaning of the statute."
>
> Fleischmann v. Forsberg, 270 U. S. 350, 70 L. ed. 634-629, Opinion below 298 Fed. 320.

> "It is an extended opinion (reported 162 Fed. 556) in which the trial judge refers to the issues formed by the pleadings, portions of the evidence, the statute, and the contentions advanced by counsel, and then discursively disposes of those contentions, and concludes that the penalty sought to be recovered had not been incurred by the defendant. Repeated decisions of the Supreme Court, as also this court, make it altogether plain that such an opinion is not a special findings within the meaning of the statute."
>
> U. S. v. Sioux City S. Y. Co. 167 Fed. 126-127, Opinion by Van Devanter, J., Opinion below 162 Fed. 556.

"The opinion was copied into the judgment entered, but is not, and was evidently not intended to be, a special finding of the ultimate facts, in the nature of a special verdict, such as is contemplated by Sections 649 and 700 of the Revised Statutes."

York v. Washburn, 129 Fed. 564-566, Opinion by Van Devanter, J., and opinion below in 118 Fed. 316.

Cyc. of Federal Procedure, Vol. 6, page 640, treating this subject, states:

"Special findings, within the purview of the statute, must be such as the statute contemplates; not a mere report of the evidence, but a finding of all those ultimate facts upon which the law must determine the rights of the parties. In this the special findings are to be likened to a special verdict of a jury. The opinion of the judge dealing generally with the issues of law and fact and giving reasons for his conclusion, is not such a special finding and is not reviewable as such." Citing:

Wilson v. Merchants L. & T. Co., 183 U. S. 121, 46 L. ed. 113;

St. Louis v. Western Union Telg. Co., 166 U. S. 388, 41 L. ed. 1044;

Grayson vs. Lynch, 164 U. S. 468, 41 L. ed. 230;

Lehnen v. Dickson, 148 U. S. 71, 37 L. ed. 373.

It will be noted that the decisions in these cases, as well as in the long line of cases cited in these opinions, do not turn on the fact that the trial court opinion is not entitled "Special Findings," but in each instance

the holding is that the substance of the decision does not amount to a special finding as required by the statute.

Having failed to request special findings, appellant by the order of January 26, 1932, attempts to have the court adopt its decision as special findings. It is reasonable to assume the court was not contemplating the requirements of the statute on findings when preparing the opinion, and to establish the practice of resorting to the opinion in lieu of findings cannot promote the ends of justice.

Moreover, this is not an attempt to correct clerical error, but to adjudicate a matter in this cause, to-wit, make special findings where none were made prior to the appeal.

> "In this case, there is a statement by the judge who decided the case, containing his opinion both on facts and the law, and which is attached to the record, and has been sent up with it. But this opinion appears to have been filed, not only after the suit had been ended by a final judgment, but after a writ of error had been served removing the case to this court. This statement of the judge cannot, therefore, be regarded as part of the record of the proceedings in the Circuit Court, which the writ of error brings up, and cannot, therefore, be resorted to as a statement of the case."
>
> U. S. v. King, 7 How. 833, 12 L. ed. 934, 940.

Appellant cites Aetna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395, as authority for this procedure. In

that case the question was only as to the jurisdiction of the trial court to make findings after the term. The case does not deal with the question of jurisdiction of the trial court after judgment and appeal perfected, or overrule or refer to the King case, 7 How. 833, 12 L. ed. 934.

The Boon case seems to turn on this proposition:

> "But there must be a finding of facts, either general or special, in order to authorize a judgment; and that finding must appear on the record. In this case, there was no formal findings of fact when the judgment was ordered. It is to be inferred, it is true, from the judgment and from the entry of the clerk, that the issues made by the pleadings was found for the plaintiffs, but how, whether generally or specially, does not appear. There was, therefore, a defect in the record, which it was quite competent for the court to supply by amendment; and such amendment was made." (24 L. ed. 396 right column).
>
> * * * * * * * * * * * * *
>
> "In so holding we do not depart from anything we have ever decided respecting the power of a court to make up a case, after the expiration of a term, for bills of exceptions not claimed at the trial. This is not a case of that kind. It is a case of a correction of the record; not merely an allowance of exceptions never taken, and necessary to have been taken, to bring an interlocutory ruling upon it." (24 L. ed. 397 right column).

The Boon decision is by divided court, Justices Strong, Bradley, Hunt, Swayne and Davis supporting

the decision, and Clifford, Miller and Field dissenting upon the question of whether the special findings were properly before the court.

The majority opinion in the Boon case seems never to have been followed or cited to this point by that court in the fifty-four years it has been on the books. The dissenting opinion is confined to this point and goes into the question at great length, and we must assume the case has been in effect overruled by those later decisions of the court, without exception refusing to consider the trial court's decision as special findings under the statute, in whatever form the opinion may have been presented in the record. In York v. Washburn, 129 Fed. 564-566, Van Devanter, J., refused to accept the trial court's decision as special findings when set out at length in the judgment. Even Mr. Justice Strong's earlier opinion in Dickinson v. Bank, 83 U. S. 250, 21 L. ed. 278, runs counter to the Boon case.

RECORD HERE DISCLOSES, BY CLERK'S RECITALS IN JUDGMENT, THAT GENERAL FINDING WAS MADE.

As we view it, the weakness of the majority opinion in the Boon case lays in the fact that it is based on the propositions, (a) that "there was * * * * a defect in the record," because it did not affirmatively appear

whether the judgment was based on general or special findings. No authority is cited by Justice Strong for such a proposition, and, of course, none can be, for if there is anything settled in the law, it is that the entry of judgment imports general findings and nothing more need appear. For example, in the instant case the judgment entered by the clerk recites

> "and the court thereafter * * * having made and filed herein its opinion and findings in favor of plaintiff and against defendant, and directing judgment as prayed in the complaint," (T. 73)

nothing more is required in the way of findings to complete the record.

> (See reasoning presented dissenting opinion Boon case 24 L. ed. p. 402, right column).

Therefore, we suggest the decision in the Boon case rests upon this wrong premise; also (b) the court there assumes the proposition, "There was, therefore, a defect in the record, which it was quite competent for the court to supply by amendment." This would seem to be a false premise, first, because the record was complete with the judgment purporting general findings, and, second, because the fact of a defect in the record does not of itself authorize action by the trial court after it has lost jurisdiction. The rule goes no farther than to authorize that a record be corrected to speak that which actually occurred upon the trial,—*not what the trial judge intended to do, but*

what he actually did. And there would seem to be no more reason for allowing the order for special findings after the term in the Boon case based upon the trial court's opinion, than there would be for allowing a bill of exceptions after term based on a reporter's transcript, or the court's notes, or memory.

Moreover, the court in the Boon case does not seem to have considered the impossibility of preserving the objections and exceptions of the litigants to findings placed in the record in such manner, in view of the inflexible rule of that court that no bill of exceptions may be settled by the trial judge after the term.

RECORD NOT PREPARED IN CONTEMPLATION OF PROPOSED INNOVATION.

The proposed innovation would be a trap for litigants and eminently unfair from still another angle.

Law cases tried to the court without jury by stipulation, may be reviewed (a) in respect to rulings by the trial court on admission or rejection of evidence or conduct of trial, (b) in respect to ruling on motion for judgment, (c) in respect to special findings made, or failure to make, (d) in respect to sufficiency of special findings to support the judgment.

Humphreys v. Bank, 75 Fed. 852-855, opinion by Taft, J.

For review under either (a), (b) and (c) bill of exceptions is necessary.

If the court has made no special findings, the litigants are justified in settling bill of exceptions exclusively to review (a) court's ruling on evidence, or (b) exclusively to review court's ruling on motion for judgment, in each instance omitting relevant evidence not deemed necessary to disclose the error complained of, and *wholly omitting from the bill of exceptions evidence necessary to disclose error of the trial court in failing to find on necessary facts,* then after settlement of bill of exceptions and being foreclosed from adding thereto by expiration of the term, and being under the delusion that no special findings have been requested or made, and therefore that no question of sufficiency of the findings or failure to make findngs may be raised or will be desirable to him on appeal, and knowing that only a prima facie case need be shown as against the motion for judgment, or that so much of the proceedings on rulings on evidence need be shown as to make the point, the term is passed, the appeal docketed, and the litigant then, for the first time, learns from his opponent's motion for diminution of record that the trial judge secretly intended his opinion, designated "Decision," as a "special finding of facts." The litigant also then realizes for the first time that he has permitted a bill of exceptions not containing the whole evidence to be settled, and that it will

avail him nothing to request additional findings within the evidence given on the trial (but not in the bill), or to object or except to these posthumous findings, because he has not preserved the evidence to support his objections.

As we see it, this court by its decision on appellant's petition for diminution of record is to adopt or reject this novel and dangerous rule of procedure. In the interest of justice it can only be rejected.

To illustrate the operation of the rule for which appellant contends, we have only to ask ourselves how would this plaintiff protect its rights as to that part of the judgment debt by which the judgment for $3819.63 exceeds the "some $3000.00 income taxes for 1921" referred to in the trial court decision which appellant would have adopted as special findings, or exceeds the $3,599.92 which the answer (T. 22) admits to have been paid.

Our memory is that in open court upon the trial defendant's attorney assented to the proposition that the amount stated in the complaint was correct. No such admission appears in the bill of exceptions or record. In settling the bill of exceptions we overlooked this omission. The omission would not seem vital in view of the general finding and judgment, and without warning that the opinion might be adopted as special findings at this late date.

Now it is proposed that the decision be adopted as

special findings. But the decision says nothing about $3819.63, and we have no way of bringing the fact even to the attention of the trial judge. We let the bill of exceptions be settled omitting evidence of this amount, or rather omitting record of the admissions in open court, after the entry of the judgment upon the general finding and when we would have a right to rely on the general findings, resting in the belief that no special findings had been or could be made, or that we could be called on to justify the amount fixed in the judgment by reason of anything stated in or omitted from the court's opinion filed in the case.

EVIDENCE AMPLE TO SUSTAIN COURT'S RULING ON DEFENDANT'S MOTION FOR JUDGMENT.

Section 879 Title 28 U. S. C. A. provides,

> "There shall be no reversal * * * for any error in fact,"

and a finding of fact contrary to the weight of the evidence is an error of fact.

Wear v. Imperial etc. Co., 224 Fed. 60-63 (8th).

The history of the Federal statute dealing with special findings in law cases tried to the court and the reasons for its enactment are set out in

Flanders v. Tweed, 9 Wall. 425, 19 L. ed. 678;
Martinton v. Fairbanks, 112 U. S. 670, 28 L. ed. 862.

From these cases it will be seen that a motion for judgment at the close of evidence in a case tried by the court, presents no different question on appeal than such motion in a case tried before a jury. The motion amounts to a demurrer to the evidence. And the question on appeal is

> "Whether the evidence, with every inference of fact that might be drawn from it in favor of the plaintiff, was sufficient in matter of law to sustain a judgment."

Maryland Casualty Co. v. Jones, 279 U. S. 792, 73 L. ed. 960-962.

If there is substantial evidence, the court cannot enter into a consideration of its weight and sufficiency.

Garwood v. Scheiber, 246 Fed. 74, Certiorari denied 247 U. S. 506, 62 L. ed. 1240;
Delaware L. & W. R. Co. v. Kutter, 147 Fed. 51, Certiorari denied 203 U. S. 588, 51 L. ed. 330.

Bearing in mind the ultimate fact for trial is whether this corporation received, owned or was entitled to any taxable income for the year 1921, we find the record discloses that the witness O'Connell testified

> "The plaintiff corporation did not transact any business whatever in the year 1921."

"Did the plaintiff corporation have, or receive, or was it entitled to any income or profits for or in the year 1921?" Answer, "No, sir." (T. 27-28.)

"J. E. O'Connell conducted that bakery business during the year 1921. That is myself." T. 28.

"Purchases were made in the name of J. E. O'Connell; our taxes were paid in the name of J. E. O'Connell." T. 61.

"Sales were in the name of J. E. O'Connell. The billheads were changed." (T. 60-61-64.)

The corporate minutes (T. 31 to 38) disclose a definite purpose to put the corporation out of business.

O'Connell personally owned the bakery (T. 48-49 and Plff's. Exs. 2 and 3).

Apply to this evidence the rule

"whether the evidence, with every inference of fact that might be drawn from it in favor of the plaintiff, was sufficient in matter of law to sustain a judgment,"

and there seems not the least question of correctness of the trial court's ruling on the motion.

WOULD SPECIAL FINDINGS IN THE TERMS OF THE DECISION SUPPORT THE JUDGMENT?

The action is for money had and received. The pleadings put in issue (a) the amount, (in part), and (b) whether or not the withholding is wrongful, de-

pending on the legality of the tax, or the ultimate fact of whether the corporation or the individual owned the income from the bakery business.

Upon the first question the decision says:

> "In 1926 the Commissioner assessed against the corporation some $3000.00 income taxes for 1921, which the corporation paid, and this action followed." (T. 66.)

It would seem a fair construction to say the word "Commissioner" refers to the United States Commissioner of Internal Revenue, and that the "some $3000.00" refers to amount paid by plaintiff to defendant for which return is here claimed. The answer (T. 22, paragraph III) admits $3,599.92 of the $3,819.93 claimed. If the court's reference to $3000.00 is a special finding of the amount paid, it would support the judgment up to that amount.

On the question of ownership of the income, the decision has this to say:

> "It is obvious that the transaction between the corporation and O'Connell was fictitious insofar as transfer of the former's assets to the latter is concerned." (T. 68.)
>
> "If the corporation had no income, the law imposed no taxes, however much property it owned; and that, whether lack of income was due to poor management, poor business, poor patronage or no collections, or inaction or suspension of business. Moreover, no taxes even though the corporation improvidently gave to another the right

to operate its instrumentalities, conduct the business, and take and enjoy the profits. That is the instant case." (T. 68.)

"The corporation relieved of all labor and responsibility to perpetuate the business, trade name and good will, was likewise of income." (T. 69.)

"Although the intent of the transaction was a sham transfer of title to the property, it was also to really vest O'Connell with all income accruing from his use of the property, thereafter both intents equally executed. The case is as simple as that of John Jones who that year permitted his son Sam to farm his father's land and take the profits. However large the latter, clearly no taxes were due from John. With that case, this is all-fours, even though confused by a disingenuous scheme." (T. 69.)

"The corporation thus having no income in 1921, the taxes assessed were illegal, and plaintiff is entitled to recover as it prays." (T. 69.)

Just what the court meant by the word "fictitious," whether void or voidable, is not clear, but it is a fair inference that the facts set out in the decision, are (a) that an intention to transfer existed, (b) that an attempt to transfer was had, (c) that the bakery business was not conducted by the corporation, (d) that the bakery business was conducted by the individual for the individual, and (e) that the income is the result of the efforts of the individual.

And as conclusions of law, the court found (a) that the income was received and owned by the individual, and (b) that the corporation neither received, nor owned nor was entitled to the income.

Whether these conclusions are correct, it seems to us is tested by the question: *In garnishment proceedings by a creditor of the corporation against the individual to recover that income, which party should prevail;* and if the individual, would it be by reason of some principle of estoppel or because the corporation never had legal title to the proceeds of bread made and sold by the individual?

Of course the individual must prevail in the suppositious case, and by reason of the fact that the corporation never had legal title to the proceeds from sale of the bread.

To illustrate, Sam with consent of his father John Jones uses the father's mare in the trucking business. If the mare has a colt, the colt belongs to John, but John never has any right or title to money received by Sam from the trucking business.

As suggested in our former brief, the Department endeavors, as a matter of convenient procedure, to enforce an office practice of holding in these close corporation cases that ownership of the instrumentalities of the business determines title to the income, but there is no reason for the courts upsetting established law in order to maintain that office practice.

Therefore, we contend that even though the order adopting the decision as special findings were lawful, and even though error had been specified on grounds of insufficiency of the findings, the language

of the decision if given its apparent meaning, would justify the judgment for at least $3,000.00.

QUESTIONS PUT BY COURT ON ORAL ARGUMENT.

Upon oral argument the court submitted two questions, which we ask leave now to discuss.

First: The court asked if appellee was not taking position on appeal contrary to theory upon which the case was tried, with reference to the question of effectiveness of the transfer from the corporation to the individual. We then responded to this question, to the effect that in the court below we had taken the position that transfer of legal title to the bakery and bakery property was not vital to plaintiff's case.

We believe an examination of our opening statement at the trial below (T. 26), together with the fact that no question was put by us on direct examination on the question of title (T. 27-28) and the further fact that the question of title was introduced at the trial by defendant, and finally that *the trial court adopted the theory that title was not controlling* (T. 69) fully sustains our response on oral argument.

An examination of the record discloses that defendant upon the trial undertook to force the theory that the question of effectiveness of the transfer was con-

trolling, while the contrary theory was maintained throughout by plaintiff.

Second: On oral argument the court called attention to the statement, page 8 appellant's brief.

> "it will be noted that he received a salary of $7500 as manager of the corporation in 1920 and a like salary from the 'Eddy Steam Bakery' in 1921,"

and the court asked if that statement was justified by the record.

We replied that any statement to the effect that the plaintiff corporation had paid O'Connell a salary in or for the year 1921, was not justified by the record.

Then the court called attention to the Item 1 of the J. E. O'Connell personal income tax return (Deft. Ex. 6) reading:

> "1. Salaries, wages, commissions, etc., Eddy's Steam Bakery, Helena, Mont. $7500,"

and asked how that item was to be squared with our statement, to which we replied that the name of the corporation in 1921 was O'Connell and Gallivan Company, and that the item could not refer to this corporation, but that we were not well enough versed in accounting to explain the item.

Since that time we have consulted the auditor who made up the return, and while it may be off the rec-

ord, we beg leave to repeat his explanation, which we adopt as our own, viz:

The entry under Item 1, is an offsetting item to the same item found on second page of the Profit and Loss Statement, Exhibit "A" attached to the return as a part of Defendant's Exhibit 6, under the heading "Less Administrative Expenses."

The books of the business are kept in a manner to reflect the *cost of manufacturing,* or *cost of doing business,* and ultimately to reflect the profit or loss in the business. To reflect the true cost of doing business, necessarily the value of O'Connell's services devoted to the business is entered as an item of cost. This item in the Profit and Loss statement forming a part of the tax return, is entered as salary $7500. The results of the Profit and Loss statement reflect the profit from the baking business, after deducting value of O'Connell's services with other costs, and this result $13,370.74 is entered as Item 5 on the face of the tax return, and if the corporation had been doing the business there would be no occasion to make any other entry, but the individual is doing the business and salaries he may charge on his books for the purpose of determining manufacturing cost, are not deductible from a statement of his personal income, and therefore the offsetting item of $7500 must be entered under the Item 1 just as the instructions

printed on the second page of the printed form direct the taxpayer to do.

We assume counsel in making the statement page 8 of original brief was misled into making the assertion. The wording used in the brief is not that O'Connell received salary from the plaintiff corporation, but from "Eddy Steam Bakery." We have every confidence counsel did not mean to be misleading with reference to the matter.

Therefore, we believe we were fully justified in advising the court that the record does not justify any statement to the effect that O'Connell received salary from the plaintiff corporation for the year 1921.

In fact Defendant's Exhibit 6 went in over objection and exception well taken, we think, and should not be considered in the evidence for any purpose.

SUMMARY

Defendant's motion for judgment, raising only the question of whether or not a prima facie case had been made, was rightly denied.

There are no special findings in the record and so there is no other matter which the court can consider, especially in the absence of assignment of error.

The practice of permitting the making of special findings after the term, and after the appeal, would

be not only contrary to established practice, but is patently capable of trapping litigants to the perversion of justice. Therefore, we urge that appellant's motion for diminution of record be denied, and that the judgment of the trial court be affirmed.

Respectfully submitted,

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Appellee.
(Helena, Montana.)

February 1932.

No. 6538

United States

Circuit Court of Appeals

For the Ninth Circuit.

TATSUMI MASUDA, or TAKASHI MASUDA, or MASUDA TATSUMI,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Appearance of Respondent	26
Assignment of Errors	35
Bond for Costs on Appeal	41
Certificate of Clerk U. S. District Court to Transcript of Record	45
Citation on Appeal	46
EXHIBITS:	
Exhibit "A"—Warrant of Arrest, Dated July 18, 1930	11
Exhibit "B"—Report of Hearing in Case of Masuda Tatsumi, or Tatsumi or Takashi Masuda	12
Exhibit "C"—Warrant of Deportation of Alien Dated November 3, 1930	24
Minutes of Court—January 19, 1931—Order Submitting Application for Writ of Habeas Corpus	27
Minutes of Court—February 16, 1931—Order Re Application for Writ of Habeas Corpus	28
Names and Addresses of Attorneys of Record	1

Index.

Page

Opinion 28
Order Allowing Petition for Appeal and Bail.. 40
Order Denying Application for Writ of Habeas Corpus, etc. 33
Order Re Application for Writ of Habeas Corpus 28
Order Submitting Application for Writ of Habeas Corpus 27
Order to Show Cause 25
Order Transmitting Original Record 43
Petition for Appeal 33
Petition for Writ of Habeas Corpus 1
Praecipe for Transcript of Record 44

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Petitioner and Appellant:

RUSSELL W. CANTRELL, Esq., and GUY C. CALDEN, Esq., Flatiron Bldg., San Francisco, Calif.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Francisco, Calif.

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 20,449–S.

MASUDA TATSUMI, or TATSUMI or TAKASHI MASUDA,

Petitioner,

vs.

JOHN D. NAGLE, Commissioner of Immigration,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable United States District Judge, Now Presiding in the Above-entitled Court:

The petition of MASUDA TATSUMI, or TATSUMI, or TAKASHI MASUDA, whose true name is TATSUMI MASUDA, respectfully represents:

I.

That your petitioner is imprisoned, detained and restrained of his liberty, and is in the custody of the above-named respondent, the Honorable JOHN D. NAGLE, Commissioner of Immigration, in and for the District of San Francisco, within the Northern District of California, under and pursuant to a warrant of deportation issued under and by authority of the Secretary of Labor commending the deportation of your petitioner to the country whence he came, to wit: the Empire of Japan, which said order of deportation was issued by the said Secretary of Labor without authority in law, and in violation of the laws of the United States of America, and of the treaty now existing between the United States of America and the Empire of Japan, as shall hereinafter mare fully appear. [1*]

II.

That the cause or pretense for such imprisonment and detention is based upon the following facts and circumstances:

That your petitioner is an alien, to wit, a subject of the Empire of Japan, and was, on the 13th day of July, 1928, under and pursuant to the provisions of subdivision 2 of section 3 of the Immigration Act of 1924, lawfully admitted into the United States, by the immigration authorities, at the port of San Francisco, as a temporary visitor, for a period not to exceed six (6) months, for the purpose of inspecting Sunday schools conducted within the State

*Page-number appearing at the foot of page of original certified Transcript of Record.

of California, with a view of your petitioner using the knowledge and experience so gained in improving the Buddhist Sunday schools conducted in the Empire of Japan.

III.

That from and after the date of the admission of your petitioner into the United States, as aforesaid, and until on or about the first day of March, 1929, your petitioner was engaged in fulfilling the purposes of such temporary visit to the United States; that your petitioner, during all of said times having intended, and intending, in good faith, upon the termination of said period of temporary admission into the United States, as aforesaid, to return to the country whence he came, to wit: the Empire of Japan.

IV.

That on or about the first day of March, 1929, your petitioner was employed as a bookkeeper by Z. INOUYE, who, during all of the times herein mentioned, has been, and is now, pursuant to, and under the authority of the provisions of section 1 of the Treaty of Commerce and Navigation, entered into between the United States of America, and the Empire of [2] Japan, on the 21st day of February, 1911, a treaty trader or merchant, and thereafter, and on or about the first day of May, 1929, the said Z. INOUYE, under and pursuant to, and by authority of the said treaty, appointed and employed your petitioner as the manager of the said business of the said Z. INOUYE, and your petitioner ever since has been, and is now the ac-

tual manager of the said business of the said Z. INOUYE, and ever since has been, and is now, in full charge of the management and conduct of the said business.

V.

That continuously for more than fifteen (15) years immediately prior the said first day of May, 1929, the said Z. INOUYE conducted and maintained, and is now conducting and maintaining, in the City of Sacramento, in the said Northern District of California, under the fictitious name of Z. INOUYE & CO., his said business, to wit: an import and export business; that said Z. INOUYE has a capital investment, in said business, approximating Fifty-five Thousand and no/100 ($55,000.00) Dollars; that the said Z. INOUYE & CO. pays an annual customs at the port of San Francisco, approximating Ten Thousand and no/100 ($10,000.00) Dollars per annum, on goods, wares and merchandise imported from the Empire of Japan, and that the said Z. INOUYE & CO. sells and disposes, during each calendar year, goods, wares and merchandise in the approximate amount of Eighty Thousand and no/100 ($80,000.00) Dollars.

VI.

That for some time last past, the said Z. INOUYE, the proprietor of the said business so conducted by him under the fictitious name of Z. INOUYE & CO. has been, and is now, absent from the State of California, to wit: in the Empire of [3] Japan, and during the entire period of such

absence the said Z. INOUYE has placed under the exclusive management of your petitioner, the management and conduct of the said business of the said Z. INOUYE, and your petitioner ever since has been, and is now, in full management and control of said business for and on behalf of his said employer, to wit: the said Z. INOUYE.

VII.

That under and by virtue of the provisions of section 1 of the said treaty so entered into, and now existing between the United States of America, and the Empire of Japan, the said Z. INOUYE, as such treaty trader, is authorized and empowered to employ such agents of his choice as may be incidental to, or necessary for, the more proper conduct and management of his said business, and in this connection your petitioner alleges:

That the said Z. INOUYE, as such treaty trader, and pursuant to, and under, and by virtue of the authority of the said provisions of the said treaty, did employ, and ever since has employed, and does now employ, your petitioner as such agent and manager of the said business of the said Z. INOUYE so located, conducted and maintained, as aforesaid, and that the supervision by your petitioner of the said business of the said Z. INOUYE, as such agent and manager thereof, and more especially during the absence from the State of California, of the said Z. INOUYE, is necessary and proper for the more efficient management and conduct of the said business, and for the more efficient conduct and carrying on of the said business

of the said Z. INOUYE, as such treaty trader, and for the more efficient carrying on for trade, or commerce, by the said Z. INOUYE, under and by [4] authority of the said treaty.

VIII.

That heretofore, and under and by virtue of a warrant of arrest issued by the Assistant to the Secretary of Labor, dated the 18th day of July, 1930, a copy whereof is hereunto annexed, marked Exhibit "A," and made a part hereof as if fully and at length set forth herein, your petitioner was taken into custody by the Commissioner of Immigration at the Angel Island Station, in the Northern District of California, for the reason, as alleged in said warrant of arrest, that your petitioner had remained in the United States for a longer period than permitted under the provisions of subdivision 2 of section 3 of the Immigration Act of 1924, and the rules and regulations of the Secretary of Labor made thereunder.

That subsequent thereto, and on the 28th day of August, 1930, your petitioner was duly granted a hearing, and was duly examined under and pursuant to the said warrant of arrest before Immigration Inspector, at the Angel Island Station, to enable your petitioner to show cause why your petitioner should not be deported from the United States in conformity with law.

Annexed hereto and marked Exhibit "B," and made a part hereof as if fully and at length set forth herein, is a transcript of the testimony taken at such hearing, together with the findings and con-

clusions of the said Examining Officer, and the recommendations of the said Examining Officer in the premises.

That at the close of the said hearing before the said Immigration Inspector, as aforesaid, the full record of said hearing, together with the findings and conclusions [5] of the said Examining Officer, and the recommendations of the said Examining Officer in the premises, were forwarded, as provided by law, to the Secretary of Labor, at Washington, D. C., for his decision as to whether or not a warrant of deportation should issue in the premises.

That thereafter, and on the 3d day of November, 1930, upon the full record thus submitted to the Secretary of Labor, by the said Examining Officer, as aforesaid, and from the proofs thus submitted to the said Secretary of Labor, in the premises, as aforesaid, the said Secretary of Labor did issue, as of said date, his warrant of deportation in the premises, a copy of which is hereunto annexed, marked Exhibit "C," and made a part hereof as if fully and at length set forth herein, wherein and whereby the said Secretary of Labor, by virtue of the alleged power and authority vested in him by the laws of the United States, did command the above-named respondent to return your petitioner to the country whence he came, to wit: to the Empire of Japan, for the reason set forth in said warrant of deportation, to wit; that your petitioner has remained in the United States for a longer time than permitted under the Immigration

Act of 1924, or regulations made thereunder, and that under and pursuant, and by virtue of said warrant of deportation, your petitioner is now in the custody of said respondent.

III.

That the restraint and imprisonment of your petitioner are illegal, and that the illegality thereof consists in this:

First: That the said decision of the said Secretary of Labor, from the proofs so submitted to him on the said record so transmitted to him, as aforesaid, that your [6] petitioner is in the United States in violation of the Immigration Act of 1924, is erroneous in law, and that said decision of said Secretary of Labor is incorrect as a matter of law, in that the said Secretary of Labor has misconstrued the provisions of the herein referred to treaty, and the provisions of the Immigration Act of 1924.

Second: That the said warrant of deportation, dated the said 3d day of November, 1930, wherein and whereby the above-named respondent is commanded to return your petitioner to the country whence he came, to wit: to the Empire of Japan, is illegal and void, and the said Secretary of Labor is without jurisdiction, under the laws of the United States, to issue such warrant of deportation.

Third: That your petitioner is not imprisoned or restrained by virtue of any final order or process, or decree of any Court.

Fourth: That your petitioner is entitled to a treaty trader status under and by virtue of section

3, subdivision 6 of the Immigration Act of 1924, and under and by authority of Article 1 of the Treaty of Commerce and Navigation entered into between the United States of America, and the Empire of Japan, on the 21st day of February, 1911.

Fifth: That under and by authority of the provisions of the said treaty, and of the said Immigration Act of 1924, your petitioner, while lawfully within the United States, had the legal right, pursuant to the laws of the United States, and of the said treaty, to, in good faith, change his status from a temporary visitor, under the provisions of subdivision 2 of section 3 of the Immigration Act of 1924, to the temporary status of a treaty trader, [7] Under and pursuant to the provisions of subdivision 6 of section 3 of the Immigration Act of 1924, and to continue to lawfully reside within the United States during the period that your petitioner maintains, and continues to maintain, such temporary status as a treaty trader.

Sixth: That your petitioner has not by thus changing, in good faith, his status from such temporary visitor to a treaty trader, violated any laws of the United States, and in consequence the Secretary of Labor is without authority, under the laws of the United States, to order the deportation, or deport, your petitioner, because of such change of status.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein, and that after due hearing thereon a writ may be issued, dis-

charging your petitioner from the custody of the respondent, the Honorable JOHN D. NAGLE, Commissioner of Immigration, and that an order to show cause be issued forthwith, ordering that the said respondent, the said Honorable JOHN D. NAGLE, Commissioner of Immigration, be and appear before this court on the 15th day of December, 1930, at the hour of 10 o'clock A. M. of said day, at the courtroom of said court, located in the Post Office Building, in the City and County of San Francisco, State of California, to show cause, if any he has, why a writ of habeas corpus should not be issued as herein prayed for, and that a copy of this petition, and said order, be served upon the said respondent, and upon the United States Attorney in and for the Northern District of California, and for such other and further relief as may be meet and proper in the premises.

TATSUMI MASUDA.

GUY C. CALDEN,
R. W. CANTRELL,
Attorneys for Petitioner. [8]

State of California,
City and County of San Francisco,—ss.

Tatsumi Masuda, being first duly sworn, deposes and says:

That he is the petitioner named in the above-entitled petition; that he has *head* read and had translated to him, the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein

stated on his information or belief, and as to those matters, he believes it to be true.

TATSUMI MASUDA.

Subscribed and sworn to before me this 5th day of December, 1930.

[Seal] MARY PALMER,

Notary Public in and for the City and County of San Francisco, State of California. [9]

EXHIBIT "A."

DEPARTMENT OF LABOR,
Washington.

No. 55706/825.

To Commissioner of Immigration, Angel Island Station, San Francisco, California, or to Any Immigrant Inspector in the Service of the United States.

WHEREAS, from evidence submitted to me, it appears that the alien TATSUMI or TAKASHI MASUDA, who landed at the Port of San Francisco, California, on the 13th day of July, 1928, has been found in the United States in violation of the immigration act of May 26, 1924, for the following among other reasons:

That he has remained in the United States for a longer time than permitted under the said Act or regulations made thereunder.

I, P. F. SNYDER, Assistant to the Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause

why he should not be deported in conformity with law.

The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation "Expenses of Regulating Immigration, 1931." Pending further proceedings the alien may be released from custody under bond in the sum of $1,000.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 18th day of July, 1930.

P. F. SNYDER,
Assistant to the Secretary of Labor. [10]

EXHIBIT "B."

U. S. DEPARTMENT OF LABOR,
Immigration Service.

File No. 12020/17502.

REPORT OF HEARING in the Case of MASUDA TATSUMI, or TATSUMI or TAKASHI MASUDA.

Under Department Warrant No. 55708/825.

Dated July 18, 1930.

Hearing conducted by Inspector J. W. Howell, at San Francisco, California. Date, Aug. 28, 1930.

Alien taken into custody at San Francisco, Cali- (Place)
fornia August 28, 1930, at 10:00 A. M., by Inspector (Date and hour)
J. W. Howell, and released from custody under bond in the sum of $1,000.00. (State if released on own recognizance or bail; or if detained, where.)

Testimony taken and transcribed by Clerk R. H. Rule.

Said alien being unable to speak and understand the English language satisfactorily, an interpreter, named Mrs. E. J. Austin, competent in the Japanese language, was employed, she being an official Japanese Interpreter. (If other than regular Government employee, state as to being first duly sworn.)

Said alien was informed that the purpose of said hearing was to afford him an opportunity to show cause why he should not be deported to the country whence he came, said warrant of arrest being read and each and every allegation therein contained carefully explained to him. Said alien was offered an opportunity to inspect the warrant of arrest and the evidence upon which it was issued, which privilege was accepted. The alien being first duly sworn ————————————, the following evidence
(If not sworn, state reason)
was presented:

Q. What is your correct name?

A. MASUDA TATSUMI.

Q. Have you ever been known by another name?

A. Tatsumi, or Takashi Masuda.

Q. You are advised that under these proceedings you have the right to be represented by counsel. Do you desire to obtain the services of a lawyer?

A. I am represented by attorneys Guy C. Calden, and M. E. Mitchell.

Q. The record shows that attorneys Guy C. Calden and M. E. Mitchell have filed letters that they

are to represent you in this matter. Is that correct? A. Yes. [11]

EXAMINING OFFICER to Attorneys CALDEN and MITCHELL: Are you ready and willing to proceed with this hearing?

By Attorney CALDEN: Yes.

(EXAMINING OFFICER to ALIEN:)

Q. What is your age and date of birth?

A. Twenty-five years, born Meiji 38, 1905 (February 1, 1905).

Q. What has been your occupation?

A. Manager of an importing company in Sacramento, the Z. Inouye Company, of 1025 Front St., Sacramento, California.

Q. What is the nature of that business?

A. Importers and exporters of provisions and drugs.

Q. How long have you been manager of that concern?

A. From a year ago in March, since March, 1929.

Q. Have you any money invested in that firm?

A. No.

Q. What salary do you receive?

A. $115.00 a month.

Q. Have you any evidence to present that you are actually the Manager of that concern?

A. Yes, I have some drafts with me with my signature, which will identify me.

Q. Is this a partnership or a corporation?

A. It is one person only.

Q. Where is Mr. Inouye now? A. In Japan.

Q. Have you any evidence to offer that you are

actually the Manager of this concern except what you have referred to?

A. I have a *person* letter written in the Japanese language but I have not got that with me.

Q. When were you engaged as Manager of this firm? A. In May, 1929.

Q. Was Mr. Inouye in the United States at that time? A. Yes.

Q. Are you still the Manager of that concern?

A. Yes.

Q. Do the books of the concern show that you are the Manager? A. Yes.

Q. Have you got the books with you? A. No.

Q. What is the capital of this concern?

A. $55,000.00.

Q. How much stock have you on hand?

A. About $12,000.00.

Q. How much money have you in the bank?

A. $4,000.00.

Q. Are you permitted to draw money from the bank as the manager of that concern? A. Yes.

Q. When and where did you enter the United States?

A. At San Francisco, California, in July, 1928, on the SS. "Tenyo Maru,"

Q. Under what status were you admitted?

A. As a Sunday School Teacher. [12]

Q. For how long were you admitted?

A. I lost my passport so I don't know for how long it was but *it* think it was for one year.

Q. Since your admission did you ever apply for an extension of stay in this country? A. No.

NOTE BY EXAMINING INSPECTOR: Alien is identified by San Francisco File No. 27010/22–27, which shows that he was admitted at this port ex SS. "Tenyo Maru," July 13, 1928, for a period of six months, as a visitor.

Q. What kind of work did you do in July or August, 1928?

I was visiting Buddhist Sunday Schools.

Q. Do you know of a camp called the Tagami Camp in Sacramento County?

A. He is a friend of mine.

Q. Did you not pick grapes at Mills, California, during July and August? A. No.

Q. What did you do after July and August, 1928?

A. I was a teacher for the Buddhist School in Sacramento, California.

Q. Why did you leave that school?

A. Because I wanted to study English.

Q. Isn't it a fact that you were forced to leave that school because you got involved there with some women?

A. There was an affair there with a woman but that was not the reason that I left the school. I gave my resignation to the school.

Q. Were you asked to resign?

A. I made the resignation myself. I was not asked to resign.

Q. Is it not a fact that you have worked as a bookkeeper for Z. Inouye & Company at 1025 Front Street, Sacramento, California, and that you are not really the Manager?

A. I am both bookkeeper and the Manager.

EXAMINING OFFICER to Attorneys MITCHELL and CALDEN: Do you wish to question the alien?

(Attorney CALDEN to ALIEN:)

Q. You have testified that you are employed by Z. Inouye & Company? A. Yes.

Q. Who is the owner of the Z. Inouye Company.

A. Mr. Inouye.

Q. Of what nationality is he? A. Japanese.

Q. You testified that you entered his employ in 1929, in May, 1929?

A. I first went to work in March.

Q. In what capacity were you employed in March?

A. As bookkeeper.

Q. When were you appointed Manager?

A. In May.

Q. What year? A. 1929.

Q. Are you now the bookkeeper and Manager?

A. Yes.

Q. Does this firm import many goods?

A. Yes, from Japan. [13]

Q. Could you say about what their gross sales are a year? A. About eight thousand dollars.

Q. Do you know what duties they pay to the Customs House?

A. About ten thousand or more per year.

Q. Who first employed you?

A. Mr. Inouye himself.

Q. And the firm is engaged in trading?

A. Yes.

Q. I will show you several drafts here, all of which contain a signature. Is that your signature?

A. Yes.

Q. How did you happen to sign these drafts, in what capacity? A. As manager.

Q. When is Mr. Inouye going to return from Japan? A. I don't know.

Q. You are the sole manager of the business now for Mr. Inouye? A. Yes.

Q. How often has Mr. Inouye gone to Japan since you have been Manager? A. Two trips.

(Attorney MITCHELL to ALIEN.)

Q. What was your purpose in coming to the United States?

A. To inspect the Sunday schools.

Q. Why did you wish to inspect the Buddhist Sunday schools in this country?

A. To improve the Sunday schools in Japan.

Q. Have the Buddhist Sunday schools in the United States developed to a point where you could learn something so as to improve the Buddhist Sunday schools in Japan? A. Yes.

Q. Who assisted you in obtaining the passport and visa which enabled you to come to the United States?

A. The Buddhist Temple, the Ko Sho Ji Buddhist Temple.

Q. How long have you been connected with the Buddhist Church altogether?

A. About a year and a half.

Q. In what capacity?

A. I was studying and helping with them.

Q. Did you ever contemplate becoming a Buddhist Priest? A. Yes.

Q. Then I understand that you came here solely because of your connection and desire to assist the Buddhist Church? A. Yes.

Q. Were you ever a merchant in Japan?

A. I took economics in school was all.

Q. At the time you came to the United States did you anticipate or contemplate becoming a merchant?

A. No.

Q. Did you know Z. Inouye at that time?

A. No.

Q. When did you first meet Z. Inouye?

A. In the first part of January, 1929. [14]

Q. Do you know why Inouye employed you as a bookkeeper and later as manager?

A. A fellow named Tonita in Sacramento was a friend of mine and he recommended me.

Q. When you were landed as a temporary visitor did you expect to return to Japan? A. Yes.

Q. Why did you change your mind?

A. Mr. Inouye asked me to help him two or three months and so I did so.

Q. Why did you stay longer?

A. Because Mr. Inouye is in Japan and has not returned.

Q. Are you engaged in any other occupation or pursuit other than carrying on the business of the Z. Inouye Company?

A. Only as a Sunday school teacher in Sacramento.

Q. Was that the Church you were originally associated with? A. No.

Q. During week days are you continuously en-

gaged in carrying on the business of the Z. Inouye Company? A. Yes.

Q. Do you perform any work or labor of any kind other than carrying on the business of that company? A. No.

(EXAMINING OFFICER to ALIEN.)

Q. At this juncture there is incorporated and made a part of the record a statement made by yourself before Inspector F. O. Seidle at Sacramento, California, on July 17, 1930. In reference to said statement I desire to quote therefrom the following question and answer: "Question: Did you understand that it would be unlawful for you to engage in any employment in view of the fact that you had been admitted to the United States as a visitor? Answer: Yes, I knew it was unlawful." At the time of your arrival at this port on the "Tenyo Maru" July 6, 1928, you appeared before a Board of Special Inquiry at Angel Island, California, and presented, among other things, a certificate which reads as follows: "Kyoto 7th of April, 1928, Teacher of Buddhist Sunday school Mr. Tatsumi Masuda, age 23 years 4 months, we delegate the above person to the United States of America for the six months in order to inspect our Sunday School for which we hereby certify." Signed Kosho Ji Buddhist Sunday School, Koshyi Sect Provost Hasui Aoki. At that time you were asked this question: "Have you any intention of remaining in the United States permanently?" Answer "no." "I have to return to Japan." What explanation have you to offer now or what is you pur-

pose at this time in regard to remaining in this country?

A. I said I did not intend to stay at that time. I have to stay until Mr. Inouye returns.

Q. Is there any intention of your remaining in this country or attempting to remain in this country now as a trader? A. Yes, as a trader.

Q. What explanation have you to offer for not returning to Japan as originally indicated in your examination at the time of your arrival?

A. I had intended to return but Mr. Inouye had put the responsibility of the firm in my hands so I could not return. [15]

Q. Have you abandoned your idea of returning to Japan?

A. I have become interested in the commercial world and I would like to follow that here in America.

Q. Is Mr. Inouye related to you in any way?

A. No.

(Attorney MITCHELL to ALIEN.)

Q. Do you receive any compensation from the Inouye Company other than your salary, $115 per month?

A. I receive thirty per cent of the net profits.

Q. Is that paid you as the Manager of the Company? A. Yes.

Q. Are there any employees of this company other than yourself? A. Yes, three.

Q. Are these employees under your direction?

A. Yes.

Q. How long has the Z. Inouye Company been in business in Sacramento altogether?

A. About 15 years continuously.

(EXAMINING OFFICER to Attorneys MITCHELL and CALDEN.)

Q. Do you desire to present any witnesses or evidence in the alien's behalf?

A. No. But if Inouye was here we would present him as a witness. He (the alien) has a mass of documentary evidence in support of his claim that he is the manager of the Z. Inouye Company and that the Z. Inouye Company is a mercantile firm engaged in international trade.

Q. Will you file a brief or argument in this case?

A. Yes.

Q. You will be furnished a copy of this transcript, together with a summary, and will be allowed ten days to file a brief, in duplicate, from receipt of the transcript, and at that time the record will be submitted to the Secretary of Labor for final consideration.

NOTE: Alien advised of the penalty for entering the United States unlawfully after having been arrested and deported.

PERSONAL DESCRIPTION OF ALIEN: 5′ 2½″; weight about 130 lbs.; black hair; brown eyes; oval face; medium mouth; flat nose; scar in eyebrow over left eye.

SUMMARY: This alien is a male, aged 25 years, single, occupation, bookkeeper and Manager, of the Japanese race, born in Japan, and last entered this

country at this port ex SS. "Tenyo Maru," on July 6, 1928, and was admitted by a Board of Special Inquiry for six months only. See local immigration file No. 27010/22–27.

The alien has not applied for extension of stay, and has abandoned the purpose for which he was originally granted permission to enter this country, viz.: "to inspect Buddhist Sunday schools in this country."

He claims to be now employed as a bookkeeper and Manager of the Z. Inouye Company, 1025 Front Street, Sacramento, California, a firm engaged in the importation and [16] exportation of merchandise, provisions and drugs.

He claims to have become the Manager of said firm in March, 1929, and to have held said position continuously since.

RECOMMENDATION: The charge contained in the warrant is believed to have been sustained.

It is therefore recommended that he be deported to Japan.

J. W. HOWELL,
Immigrant Inspector.

I certify that the foregoing is a true and correct transcript of the record of hearing in this case.

R. H. RULE,
Stenographer. [17]

EXHIBIT "C."

Form 8 B.
Bureau of Immigration.
No. 12020–17502.
No. 55708/825

WARRANT—DEPORTATION OF ALIEN.

UNITED STATES OF AMERICA,
Department of Labor,
Washington.

To Commissioner of Immigration, Angel Island Station, San Francisco, California, or to Any Officer or Employee of the United States Immigration Service.

WHEREAS, from proofs submitted to me, Assistant to the Secretary, after due hearing before Immigrant Inspector J. W. Howell, held at San Francisco, Calif. I have become satisfied that the alien, TAKSUMI, or TAKASHI MASUDA *alias* MASUDA TATSUMI, who landed at the port of San Francisco, California, ex S.S. "TENYO MARU," on the 13th day of July, 1928, has been found in the United States in violation of the immigration act of May 26th, 1924, to-wit: That he has remained in the United States for a longer time than permitted under the said act or regulations made thereunder, and may be deported in accordance therewith:

I, W. N. SMELSER, Assistant to the Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to

Japan, the country whence he came, at the expense of the appropriation "Expenses of Regulating Immigration, 1931," including the expenses of an attendant, if necessary. Delivery of the alien and acceptance for deportation will serve to cancel the outstanding appearance bond.

For so doing, this shall be your sufficient warrant.

WITNESS my hand and seal this 3rd day of November, 1930.

(Sg) W. N. SMELSER,
Assistant to the Secretary of Labor.

[Endorsed]: Filed Dec. 5, 1930. [18]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Good cause appearing therefor, and upon reading the verified petition on file herein,—

IT IS HEREBY ORDERED that John D. Nagle, Commissioner of Immigration for the Port of San Francisco, appear before this court on the 15th day of December, 1930, at the hour of ten o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of the petition and said order be served upon the United States Attorney for this District, his representative herein.

AND IT IS FURTHER ORDERED that the said John D. Nagle, Commissioner of Immigration, as aforesaid, or whoever, acting under the orders

of the said Commissioner, or the Secretary of Labor, shall have the custody of the said Masuda Tatsumi, or Tatsumi or Takashi Masuda, or the Master of any steamer upon which he may have been placed for deportation by the said Commissioner, are hereby ordered and directed to retain the said Masuda Tatsumi, or Tatsumi, or Takashi Masuda, within the custody of the said Commissioner of Immigration, and within the jurisdiction of this court until its further order herein.

Dated at San Francisco, California, Dec. 6th, 1930.

ST. SURE,
United States District Judge. [19]

[Endorsed]: Filed Dec. 6, 1930. [20]

[Title of Court and Cause.]

APPEARANCE OF RESPONDENT.

Respondent hereby *appear* through the undersigned attorney and files herewith as Respondent's Exhibit "A" the original certified record of immigration proceedings before the Bureau of Immigration and Department of Labor relative to the abovenamed petitioner.

GEO. J. HATFIELD. (Signed)
GEO. J. HATFIELD,
United States Attorney,
Attorney for Respondent.

[Endorsed]: Filed Jan. 19, 1931. [21]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 19th day of January, in the year of our Lord one thousand nine hundred and thirty-one. Present: The Honorable A. F. ST. SURE, District Judge, et al.

[Title of Court and Cause.]

MINUTES OF COURT—JANUARY 19, 1931—ORDER SUBMITTING APPLICATION FOR WRIT OF HABEAS CORPUS.

The application for writ of habeas corpus (by order to show cause) came on to be heard. R. W. Cantrell, Esq., appearing as attorney for petitioner, and H. A. van der Zee, Esq., Asst. U. S. Atty., appearing as attorney for respondent. Mr. van der Zee filed the appearance of the respondent and the Record of the Bureau of Immigration. After hearing the attorneys, IT IS ORDERED that said application be submitted upon the filing of briefs in 10 and 5 days. [22]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 16th day of February, in the year of our Lord one thousand nine hundred and thirty-one. Present: The Honorable A. F. ST. SURE, District Judge, et al.

[Title of Court and Cause.]

MINUTES OF COURT—FEBRUARY 16, 1931—ORDER RE APPLICATION FOR WRIT OF HABEAS CORPUS.

On motion of H. A. van der Zee, Esq., Asst. U. S. Atty., IT IS ORDERED that the application for writ of habeas corpus herein stand submitted for consideration and decision. [23]

[Title of Court and Cause.]

OPINION.

GUY C. CALDEN, Esq., RUSSELL W. CANTRELL, Esq., Attorneys for Petitioner, San Francisco, California.

GEORGE J. HATFIELD, Esq., U. S. Attorney, Attorney for Respondent, San Francisco, California.

ST. SURE, D. J.—Petitioner, a subject of Japan, was, on July 13, 1928, admitted to the

United States at the port of San Francisco under subdivision 2 of Section 3 of the Immigration Act of 1924 as a temporary visitor for a period not to exceed six months, for the purpose of inspecting a Buddhist Sunday School. The Ko Sho Ji Buddhist Temple in Japan assisted him in obtaining his passport, and upon arrival here he claimed to be a Buddhist preacher, and testified that he contemplated becoming a Buddhist priest. He presented a certificate reading as follows:

> "Koyoto 7th of April, 1928, Teacher of Buddhist Sunday School Mr. Tatsumi Masuda, age 23 years 4 months, we delegate the above person to the United States of America for the six months in order to inspect our Sunday School for which we hereby certify."
>
> Signed: Kosho Ji Buddhist Sunday School, Koshyi Sect Provost Hasui Aoki.

Almost two months after the expiration of his six months' stay, about March 1, 1929, he became engaged as a bookkeeper by Z. Inouye, a treaty trader in the import and export business. Petitioner claims that he became the manager of this business about May 1, 1929.

On July 18, 1930, petitioner was taken into custody by the Commissioner of Immigration for the reason that he had [24] remained in the United States for a longer period than permitted under the provisions of subdivision 2 of section 3 of the Immigration Act of 1924. On August 28, 1930, he was granted a hearing to enable him to show cause why he should not be deported. The record and

findings of this hearing were forwarded to the Secretary of Labor at Washington, D. C., and on November 3, 1930, the Secretary of Labor issued a warrant of deportation, upon the ground that petitioner had remained in this country for a longer time than permitted under the Immigration Act.

Petitioner claims that he is entitled to a treaty trader status by virtue of subdivision 6 of section 3 of the Immigration Act, and under Article I of the Treaty of Commerce and Navigation between United States and Japan dated February 21, 1911; that he had a right, while lawfully within the United States, to change his status from that of a temporary visitor to that of a treaty trader; that even though his alleged change of status did not take place until almost four months after the expiration of his six months' stay, it was timely because made before the institution of deportation proceedings.

In stressing claimed rights under the treaty with Japan petitioner relies upon Metaxis vs. Weedin, No. 5947, Ninth Circuit, May 26, 1930. The facts there were entirely different from those in the instant case. Metaxis, a subject of Greece, was admitted to the United States as a visitor on February 11, 1924, for a period of six months, and immediately entered into a partnership with his brother in mercantile business. Metaxis' admission was under the Quota Act of 1921 as amended in 1922 (42 Stat. 540), and it was under the provisions of that Act and a supposed treaty with Greece that the Circuit Court held him to be permitted to re-

main in this country. On rehearing, however, the Government called the Court's attention [25] to the fact that the treaty with Greece had been abrogated, thus presenting an entirely different situation, whereupon the Court held that Metaxis should be deported, 44 Fed. (2d) 539. Since the entry of Metaxis in February, 1924, the law has been changed, and we now have the Immigration Act of May 26, 1924, which provides that any alien who remains longer than the time permitted by the Act and regulations thereunder shall be taken into custody and deported.

Petitioner contends that he was lawfully within the United States at the time that he changed his status, when, as a matter of fact, his stay here was unlawful. The time of his temporary permit had expired, and under such circumstances attempting to take on the status of a treaty trader would avail him nothing. He applied for and obtained temporary admission under the immigration laws as as alien otherwise inadmissible. He entered into a solemn obligation with the authorities representing the United States Government to depart within six months. At the expiration of that period his stay within the United States was unlawful, and he states he knew it was unlawful. Section 14 of the Immigration Act of 1924 (8 U. S. C. A., Sec. 214) provides that any alien who remains longer than the time permitted by the Act and regulations thereunder "shall be taken into custody and deported." Under all the authorities an alien gains no rights by an occupation entered into while un-

lawfully in the country. Sugimoto vs. Nagle, 38 Fed. (2d) 207, *certiorari* denied, 281 U. S. 745; Wong Gar Wah vs. Carr, 18 Fed. (2d) 250; Wong Mon Lun vs. Nagle, 39 Fed. (2d) 844; Wong Fat Sheun vs. Nagle, 7 Fed. (2d) 611; Ewing Yuen vs. Johnson, 299 Fed. 604; In re Low Yin, 13 Fed. (2d) 265.

Petitioner suggests that should he be deported, he might thereafter be admitted as a treaty trader under the provisions of the treaty and the Act of 1924, and therefore the law should be construed to fit his case. But the express provision of [26] the Act will admit of no such construction. Furthermore, what petitioner's rights would be on attempting to re-enter is not now before the court. Marty vs. Nagle, 44 Fed. (2d) 695. There may be some hardship involved in petitioner's deportation under the circumstances, but, as was said by Judge Wilbur in Sugimoto vs. Nagle, 38 Fed. (2d) 207, 209, these considerations are properly directed to the legislative rather than to the judicial branch of the Government.

The application for a writ of habeas corpus will be denied, and the petition dismissed.

Dated: May 8, 1931.

[Endorsed]: Filed May 8, 1931, 12:25 P. M. [27]

[Title of Court and Cause.]

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS, ETC.

This matter having been heard on the application for a writ of habeas corpus (by order to show cause), and having been argued and submitted,

IT IS ORDERED, after a full consideration, that the application for a writ of habeas corpus be, and the same is hereby DENIED; that the petition be, and the same is hereby DISMISSED; that the order to show cause be, and the same is hereby DISCHARGED; and that the petitioner be, and he is hereby remanded to the custody of the United States Immigration Authorities at San Francisco, California, for DEPORTATION.

Dated: May 8, 1931.

A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed May 8, 1931, 12:26 P. M. [28]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Now comes Masuda Tatsumi, or Tatsumi, or Takashi Masuda, whose true name is Tatsumi Masuda, the petitioner and appellant herein, and says:

That on the 8th day of May, 1931, the above-entitled court made and entered its final judgment

and order denying the petition for a writ of habeas corpus, as prayed for, on file herein, in which said judgment and order, in the above-entitled proceeding, certain errors were made to the prejudice of the petitioner and appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, this petitioner and appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said Circuit Court of Appeals; and further, that the said petitioner and appellant be held within the jurisdiction of this court during the pendency of the appeal, [29] so that he may be produced in execution of whatever judgment may be finally entered herein, and that the petitioner and appellant be released on bail, in an amount to be fixed by this court, pending the final disposition of said appeal.

Dated this 15th day of May, 1931.

R. W. CANTRELL,
GUY C. CALDEN,
Attorneys for Petitioner and Appellant.

[Endorsed]: Filed May 15, 1931. [30]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes Masuda Tatsumi, or Tatsumi, or Takashi Masuda, whose true name is Tatsumi Masuda, the petitioner and appellant herein, by his attorneys, in connection with the petition for an appeal herein, and assigns the following errors which he avers accrued upon the hearing of the above-entitled cause, and upon which he will rely upon appeal, to the Circuit Court of Appeals, for the Ninth Circuit, to wit:

I.

That the Court erred in denying the petition for a writ of habeas corpus herein, and remanding the petitioner and appellant to the Immigration Authorities for deportation.

II.

That the Court erred in holding that it had no jurisdiction to issue a writ of habeas corpus, as prayed for in the petition herein.

III.

That the Court erred in holding that the allegations of the petition were not sufficient to justify the issuance [31] of a writ of habeas corpus, as prayed for in said petition, and in remanding the petitioner and appellant to the Immigration Authorities for deportation.

IV.

That the Court erred in holding that the allegations contained in the petition herein, for a writ of habeas corpus, and the facts presented upon the issue made and joined herein, were insufficient in law, to justify the discharge of the petitioner and appellant from custody, as prayed for in said petition.

V.

That the Court erred in holding that the decision of the Secretary of Labor, that the petitioner and appellant is in the United States in violation of the Immigration Act of 1924, is not erroneous in law, and that the said Secretary of Labor, has not misconstrued the Treaty and Immigration Laws referred to in said petition.

VI.

That the Court erred in holding that the imprisonment and detention of petitioner and appellant are legal.

VII.

That the Court erred in holding that the Secretary of Labor, had jurisdiction, under the laws of the United States, to issue the warrant of deportation, as referred to in said petition.

VIII.

That the Court erred in holding that the petitioner and appellant is not entitled to a treaty trader status, under and by virtue of section 3, subdivision 6 of the Immigration Act of 1924, and under and by authority of [32] Article 1 of the

Treaty of Commerce and Navigation, entered into between the United States of America, and the Empire of Japan, on the 21st day of February, 1911, as referred to in said petition.

IX.

That the Court erred in holding that the petitioner and appellant, the duly appointed agent of a treaty trader, lawfully domiciled and residing within the United States, under and pursuant to the provisions of the Treaty of Commerce and Navigation entered into between the United States, and the Empire of Japan, on the 21st day of February, 1911, was not entitled to remain within the United States during the period that such status continued.

X.

That the Court erred in holding that a treaty trader and pursuant to the provisions of Article 1 of the said Treaty, while lawfully domiciled within continental United States, was prohibited, under the laws of the United States, from employing, as the agent of his choice, the *petition* and appellant, as manager of the business of such treaty trader conducted and maintained within continental United States.

XI.

That the Court erred in holding that under and by virtue of the provisions of the Treaty of Commerce and Navigation, entered into between the United States of America, and the Empire of Japan, on the 21st day of February, 1911, and under and by authority of the Immigration Act of

1924, the petitioner and appellant, who was lawfully admitted to the United States, did not have the legal right, pursuant to the [33] laws of the United States, and of the said Treaty, to, in good faith, change his status from that of a temporary visitor, under the provisions of subdivision 2 of section 3, of the Immigration Act of 1924, to the temporary status of a treaty trader, under and pursuant to the provisions of subdivision 6 of section 3 of the Immigration Act of 1924, and to continue to lawfully reside within the United States during the period that the petitioner and appellant maintains, and continues to maintain, such temporary status as a treaty trader.

XII.

That the Court erred in holding that the petitioner and appellant, after lawful admission into the United States, by changing, in good faith, his status from that of a temporary visitor, to that of a treaty trader, violated the laws of the United States, and that in consequence the Secretary of Labor had authority, in law, to order the deportation, and deport, *petition* and appellant, because of such change of status.

XIII.

That the Court erred in holding that the petitioner and appellant, after lawful admission into continental United States, by changing, in good faith, his status from that of a temporary visitor, under the provisions of subdivision 2 of Section 3 of the Immigration Act of 1924, to that of a treaty

trader, under the provisions of subdivision 6 of Section 3 of said Act, thereby conclusively evidenced his intention of abandoning his status as an alien entitled to temporarily reside within continental United States, as a nonimmigrant, to that of an immigrant for permanent residence within the United States.

XIV.

That the judgment and order made and entered herein [34] was, and is, contrary to law.

XV.

That the judgment and order made and entered herein was, and is, contrary to the sworn allegations of the petition for a writ of habeas corpus.

XVI.

That the judgment made and entered herein was not supported by the evidence.

XVII.

That the judgment made and entered herein is contrary to the evidence.

WHEREFORE, the petitioner and appellant prays that the final judgment and order of the Southern Division of the United States District Court, for the Northern District of California, made and entered herein, on the 8th day of May, 1931, denying the petition for a writ of habeas corpus, and dismissing the said petition, and discharging the order to show cause, heretofore issued herein, why the writ of habeas corpus should not issue on the allegations of said petition, and remanding the

petitioner and appellant to the Immigration Authorities for deportation, be reversed, and that this cause be remitted to the lower court, with instructions to issue a writ of habeas corpus, as prayed for in said petition.

Dated at San Francisco, California, this 15th day of May, 1931.

R. W. CANTRELL,
GUY C. CALDEN,
Attorneys for Petitioner and Appellant.

[Endorsed]: Filed May 15, 1931. [35]

[Title of Court and Cause.]

ORDER ALLOWING PETITION FOR APPEAL AND BAIL.

On this 15th day of May, 1931, comes Masuda Tatsumi, or Tatsumi or Takashi Masuda, whose true name is Tatsumi Masuda, by his attorneys, and having previously filed herein, his petition for an appeal, together with an assignment of errors, as provided by law, did present to this Court, his petition praying for the allowance of an appeal to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment and order of this Court, duly given, made and entered on the 8th day of May, 1931, denying the application of petitioner and appellant for a writ of habeas corpus, and remanding the petitioner and appellant to the Immigration Authorities for deportation, intending to be urged and prosecuted by him, and praying also

that a transcript of the record and proceedings and papers upon which the said final judgment and order herein was rendered, duly authenticated, may be sent and transmitted to the said Circuit Court of Appeals, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court allows the appeal hereby prayed for, and orders execution and remand [36] stayed pending the hearing of the said cause in the said Circuit Court of Appeals for the Ninth Circuit; and

IT IS FURTHER ORDERED that pending said appeal the petitioner and appellant be released on bail, on the execution of a bond in the sum of $1,000.00, to be conditioned as required by law, with sureties to be approved by a Commissioner of this court.

Dated at San Francisco, California, this 15th day of May, 1931.

FRANK H. KERRIGAN,
United States District Judge.

[Indorsed]: Filed May 15, 1931. [37]

BOND FOR COSTS ON APPEAL.

HABEAS CORPUS.

No. 20,449–S.

KNOW ALL MEN BY THESE PRESENTS that we, Masuda Tatsumi, or Tatsumi or Takashi Masuda, whose true name is Tatsumi Masuda, as principal, and New Amsterdam Casualty Company,

as surety, are held and firmly bound unto United States of America in the full and just sum of Two Hundred Fifty ($250.00) Dollars, to be paid to the said United States of America, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of May in the year of our Lord one thousand nine hundred and thirty-one.

WHEREAS, lately at a District Court of the United States for the Northern District of California, in a suit depending in said court, in the matter of Masuda Tatsumi or Tatsumi or Takashi Masuda, whose true name is Tatsumi Masuda, on Habeas Corpus, No. 20,449–S. a judgment and sentence was rendered against the said Masuda Tatsumi, or Tatsumi or Takashi Masuda, whose true name is Tatsumi Masudi, and the said Masuda Tatsumi or Tatsumi or Takashi Masuda, true name Tatsumi Masuda, having obtained from said court an order granting an appeal to reverse the judgment and sentence in the aforesaid suit, and a citation directed to *the* John D. Nagle, Esq., Commissioner of Immigration, San Francisco, California, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,—

Now, the condition of the above obligation is such, that if the said Masuda Tatsumi or Tatsumi or

Takashi Masuda, true name Tatsumi Masuda, shall prosecute to effect, and answer all costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue. [38]

This recognizance shall be deemed and construed to contain the "Express agreement" for summary judgment and execution thereon, mentioned in Rule 34 of the District Court.

TATSUMI MASUDA, (Seal)
1025 Front St., Sacto.

NEW AMSTERDAM CASUALTY CO. (Seal)
[Seal] By GEO. W. POULTNEY,
Attorney-in-fact.

Acknowledged before me the day and year first above written.

ERNEST E. WILLIAMS, (Seal)
U. S. Commissioner Northern District of California at S. F.

[Endorsed]: Filed May 13, 1931, 2:11 P. M. [39]

[Title of Court and Cause.]

ORDER TRANSMITTING ORIGINAL RECORD.

On motion of R. W. Cantrell, Esq., one of the attorneys for the petitioner and appellant, and good cause appearing therefor,—

IT IS HEREBY ORDERED that the original certified record of the immigration proceedings, before the Bureau of Immigration, and Department

of Labor, in the above-entitled cause, now on file, in the Clerk's office, be transmitted to the United States Circuit of Appeals, for the Ninth Circuit.

IT IS FURTHER ORDERED that the said original certified record need not be incorporated in the printed transcript on appeal herein.

Dated at San Francisco, California, this 15th day of May, 1931.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed May 15, 1931. [40]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please prepare transcript on appeal in the above-entitled cause, to be composed of the following papers, to wit:

1. Petition for writ of habeas corpus.
2. Order to show cause, issued on December 6th, 1930.
3. Appearance of respondent.
4. Minute order, dated January 19th, 1931, submitting cause on briefs.
5. Minute order dated February 16th, 1931, ordering cause submitted for decision.
6. Order dated May 8th, 1931, denying application for writ of habeas corpus; dismissing order to show cause, and remanding peti-

tioner to the custody of the immigration authorities for deportation.

7. Opinion of the Court filed in support of said order, dated May 8th, 1931.
8. Petition for appeal.
9. Order allowing petition for appeal.
10. Assignment of errors.
11. Cost bond on appeal.
12. Order dated May 15, 1931.

R. W. CANTRELL,
GUY C. CALDEN,
Attorneys for Petitioner and Appellant.

[Endorsed]: Filed May 15, 1931. [41]

[Title of Court.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 41 pages, numbered from 1 to 41, inclusive, contain a full, true, and correct transcript of the records and proceedings in the Matter of Masuda Tatsumi, etc., on habeas corpus, No. 20,449–S. as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Sixteen Dollars ($16.00), and that the said amount has been paid to me by the attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of June, A. D. 1931.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [42]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to JOHN D. NAGLE, Commissioner of Immigration, San Francisco, California, and United States Attorney for Northern District of California, San Francisco, California, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City and County of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Masuda Tatsumi, or Tatsumi, or Takashi Masuda, whose true name is Tatsumi Masuda, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said order allowing appeal mentioned, should not be cor-

rected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States [43] District Judge for the Northern District of California, Southern Division, this 15th day of May, A. D. 1931.

FRANK H. KERRIGAN,
United States District Judge.

Service of the within citation on appeal and receipt of a copy is hereby admitted this 15 day of May, 1931.

GEO. J. HATFIELD,
United States Attorney,
V. de ZP.

[Endorsed]: Filed May 15, 1931, 10:22 A. M. [44]

[Endorsed]: No. 6538. United States Circuit Court of Appeals for the Ninth Circuit. Tatsumi Masuda, or Takashi Masuda, or Masuda Tatsumi, Appellant, vs. John D. Nagle, as Commissioner of Immigration at the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 25, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Frank H. Schmid,
Deputy Clerk.

No. 6538

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 21

TATSUMI MASUDA or Takashi Masuda, or Masuda Tatsumi,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

APPELLANT'S OPENING BRIEF.

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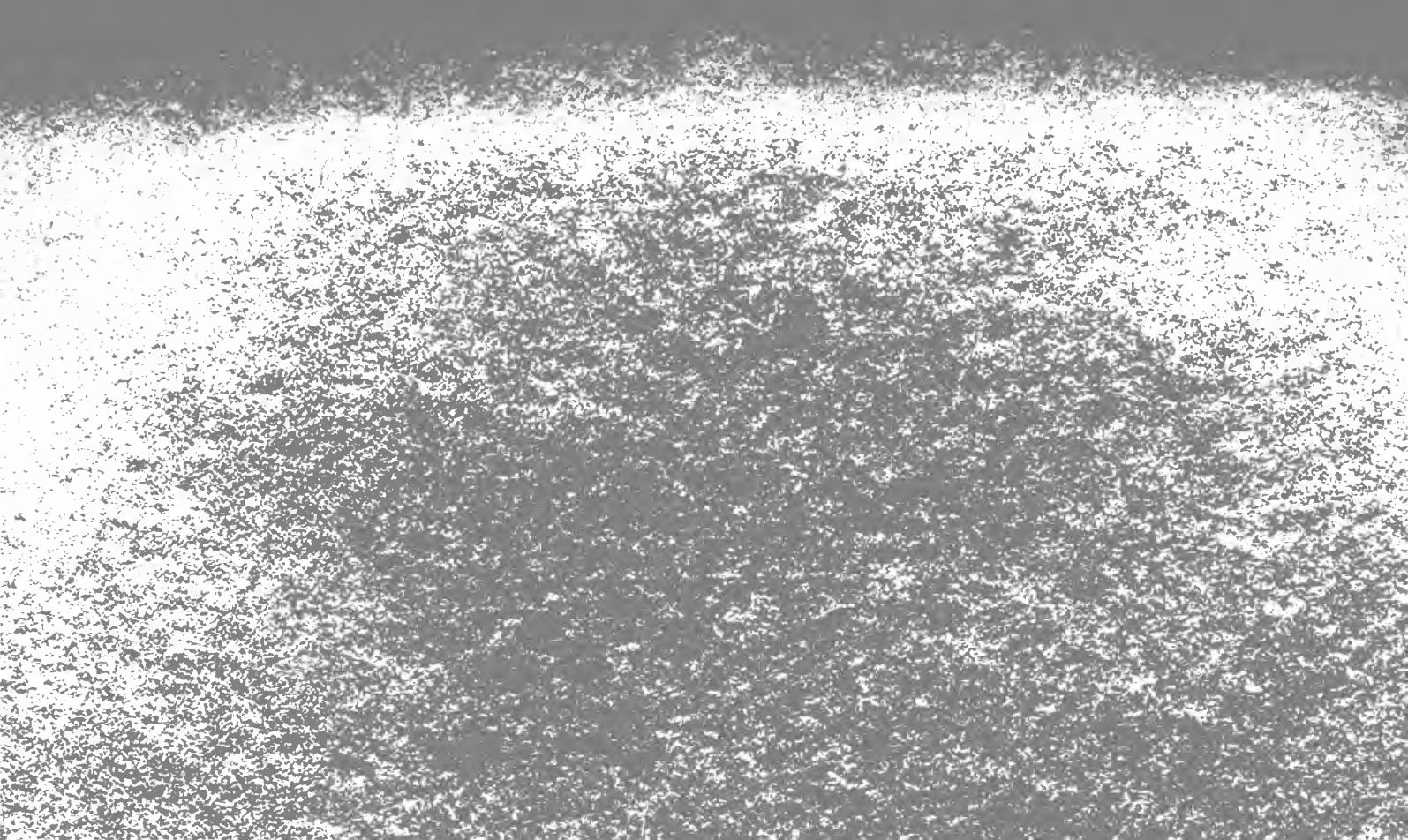

Subject Index

Page

Facts of the case 1

Argument 8

Conclusion 29

Table of Authorities Cited

Pages

Dang Foo v. Day, 50 Fed. (2d) 116 21

Ewing Yuen v. Johnson, 299 Fed. 604 ..... 5, 27, 28, 29

Section 3 of the 1917 Immigration Act 19

Section 3, subdivision 2 of the Immigration Act of 1924 ..... 3, 8, 11, 12, 14, 16, 19, 29

Subdivision 6 of Section 3 of the Immigration Act of 1924 ..... 4, 8, 10, 11, 12

Section 14, Section 15, of the Immigration Act of 1924 ..... 14, 15, 17, 18, 20, 21, 23, 24

1924 Immigration Act, Immigration Rule 3, subdivision (h), paragraph 1 and 3 18

Metaxis v. Weeden (rehearing opinion), 44 Fed. (2nd) 539 ..... 5, 23, 24, 25, 26, 29

Shizuko Kumanomido v. Nagle, 40 Fed. (2nd) 42 11

Wong Gar Wah v. Carr, 18 Fed. (2nd) 250 ..... 5, 27, 29

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Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal from an order and judgment of the Southern Division of the United States District Court, for the Northern District of California, denying the petition for a writ of habeas corpus, filed herein by the petitioner.

FACTS OF THE CASE.

The facts of the case are quite simple, and are without conflict.

A correct recital of these facts appears in the opinion handed down by the learned Judge of the Court below, from which we quote:

"Petitioner, a subject of Japan, was, on July 13, 1928, admitted to the United States, at the port of San Francisco, under subdivision 2 of Section 3 of the Immigration Act of 1924, as a temporary visitor, for a period not to exceed six months, for the purpose of inspecting a Buddhist Sunday School. The Ko Sho Ji Buddhist Temple in Japan assisted him in obtaining his passport, and upon arrival here he claimed to be a Buddhist preacher, and testified that he contemplated becoming a Buddhist priest. He presented a certificate reading as follows:

> 'Kyoto 7th of April, 1928, Teacher of Buddhist Sunday School Mr. Tatsumi Masuda, age 23 years 4 months, we delegate the above person to the United States of America for the six months in order to inspect our Sunday School for which we hereby certify.'
>
> Signed: Koshi Ji Buddhist Sunday School, Koshi Sect Provost Hasui Aoki.

Almost two months after the expiration of his six months' stay, about March 1, 1929, he became engaged as a bookkeeper by Z. Inouye, a treaty trader in the import and export business. Petitioner claims that he became a manager of this business about May 1, 1929.

On July 18, 1930, petitioner was taken into custody by the Commissioner of Immigration for the reason that he had remained in the United States for a longer period than permitted under the provisions of subdivision 2 of Section 3 of the Immigration Act of 1924. On August 28, 1930, he was granted a hearing to enable him to show cause why he should not be deported. The record

> and findings of this hearing were forwarded to the Secretary of Labor at Washington, D. C., and on November 3, 1930, the Secretary of Labor issued a warrant of deportation, upon the ground that petitioner had remained in this country for a longer time than permitted under the Immigration Act. (Tr. pp. 28-29.)"

The sole ground for denying the petitioner the right to remain in continental United States, during the period that, and only so long as, the petitioner maintained his status as a non-immigrant, under the Immigration Act of 1924, appears in the Warrant of Deportation issued by the Secretary of Labor, under date of November 3rd, 1930, as follows:

> "That the petitioner has remained in the United States for a longer time than permitted under the Immigration Act of 1924, or regulations made thereunder." (Tr. p. 24.)

It is apparent that the important question presented for decision relates to the legality of the act of an alien, regularly admitted into the United States, who, in good faith while domiciled therein, changes his status from "an alien visiting the United States temporarily, as a tourist, or temporarily for business," to the status of "an alien entitled to remain in the United States solely to carry on trade, under and in pursuance of a present existing treaty of commerce and navigation."

If, in making such a change as a non-immigrant, from his status as a temporary visitor, under Section 3, subdivision 2 of the Immigration Act of 1924, to

the temporary status of a treaty trader, under Section 3, subdivision 6 of said Act, the alien violated any law of the United States, then, we concede, the alien, being unlawfully in the United States, is subject to deportation.

If, on the other hand, in making such a change of status as a non-immigrant, the alien violated no law of the United States, then we respectfully submit the alien has a legal right to remain in the United States while this non-immigrant status continues, and, in consequence, the decision of the learned Judge of the Court below, being erroneous, the judgment and order appealed from should be reversed.

We respectfully submit that the instant case involves primarily a construction of the provisions of the Treaty of Commerce and Navigation entered into between this country and the Empire of Japan, on February 21st, 1911, and therefore the case is strictly a treaty case, and the solution of the problem presented for decision necessarily requires the proper interpretation, construction and application of the provisions of said Treaty in connection with the provisions of the Immigration Act of 1924, and the rules and regulations promulgated by the Secretary of Labor, to carry into effect the provisions of this Act.

We concede, if no question of treaty rights was involved, that the period of petitioner's visit in this country having expired, and the consent of our Government to his presence in this country having been withdrawn by the institution of deportation proceed-

ings, petitioner was illegally in the country, and the deportation order was proper.

Metaxis v. Weeden (Rehearing Opinion), 44 Fed. (2nd) 539;

Wong Gar Wah v. Carr, 18 Fed. (2nd) 250;

Ewing Yuen v. Johnson, 299 Fed. 604.

The opinion of the learned judge of the Court below, handed down at the time that the petitioner's petition for the writ was denied, is apparently based upon the proposition that immediately upon the expiration of six months, the period that petitioner was admitted into the United States as a temporary visitor, his further stay in continental United States became *eo instante* unlawful; that, in consequence, the subsequent change in status of the petitioner from that of a temporary visitor, to that of a treaty trader, was in violation of the laws of the United States, subjecting him to deportation.

We appreciate the difficult task presented, of endeavoring to convince this Honorable Court that the opinion of the learned judge of the Court below, for whose learning and ability we have the greatest respect, is erroneous, and, in consequence, that the order and judgment appealed from should be reversed, but we feel confident that in view of the attitude disclosed by this Honorable Court, in its many opinions handed down, bearing upon the liberal interpretation and construction of our immigration laws, and the steadfast endeavor of this Honorable Court to so construe the provisions of the immigration laws of our country as to keep them in harmony with existing treaties, that

this Honorable Court will so construe the applicable provisions of the Immigration Act of 1924, to the instant appeal, with the provisions of the said Treaty, as to continue this harmonious interpretation.

We shall endeavor to show, in this argument, that in denying the petition for the writ, the learned judge of the Court below erred in the particulars, amongst others, indicated by appellant's assignment of errors, appearing on page 35 et seq. of the Transcript of Record filed herein, as follows:

1. "That the Court erred in holding that the petitioner and appellant is not entitled to a treaty trader status, under and by virtue of Section 3, subdivision 6 of the Immigration Act of 1924, and under and by authority of Article 1 of the Treaty of Commerce and Navigation, entered into between the United States of America and the Empire of Japan, on the 21st day of February, 1911, as referred to in said petition.

2. That the Court erred in holding that the petitioner and appellant, the duly appointed agent of a treaty trader, lawfully domiciled and residing within the United States, under and pursuant to the provisions of the Treaty of Commerce and Navigation entered into between the United States, and the Empire of Japan, on the 21st day of February, 1911, was not entitled to remain within the United States during the period that such status continued.

3. That the Court erred in holding that a treaty trader, pursuant to the provisions of Article 1 of the said Treaty, while lawfully domiciled within continental United States, was prohibited, under the laws of the United States, from

employing, as the agent of his choice, the petitioner and appellant, as manager of the business of such treaty trader, conducted and maintained within continental United States.

4. That the Court erred in holding that under and by virtue of the provisions of the Treaty of Commerce and Navigation, entered into between the United States of America, and the Empire of Japan, on the 21st day of February, 1911, and under and by authority of the Immigration Act of 1924, the petitioner and appellant, who was lawfully admitted into the United States, did not have the legal right, pursuant to the laws of the United States, and of the said Treaty, to, in good faith, change his status from that of a temporary visitor, under the provisions of subdivision 2 of Section 3 of the Immigration Act of 1924, to the temporary status of a treaty trader, under and pursuant to the provisions of subdivision 6 of Section 3 of the Immigration Act of 1924, and to continue to lawfully reside within the United States during the period that the petitioner and appellant maintains, and continues to maintain, such temporary status as a treaty trader.

5. That the Court erred in holding that the petitioner and appellant, after lawful admission into the United States, by changing, in good faith, his status from that of a temporary visitor, to that of a treaty trader, violated the laws of the United States, and that, in consequence, the Secretary of Labor had authority, in law, to order the deportation, and deport, petitioner and appellant, because of such change of statuts.

6. That the Court erred in holding that the petitioner and appellant, after lawful admission

into continental United States, by changing, in good faith, his status from that of a temporary visitor, under the provisions of subdivision 2 of Section 3 of the Immigration Act of 1924, to that of a treaty trader, under the provisions of subdivision 6 of Section 3 of said Act, thereby conclusively evidenced his intention of abandoning his status as an alien, entitled to temporarily reside within continental United States, as a non-immigrant, to that of an immigrant for permanent residence within the United States."

ARGUMENT.

As the facts show, the petitioner was admitted into the United States as a non-immigrant, for a period of six months, pursuant to the provisions of subdivision 2 of Section 3 of the Immigration Act of 1924, which reads as follows:

> "Sec. 3. When used in this Act, the term 'immigrant' means any alien departing from any place outside of the United States, destined for the United States, except (2) an alien visiting the United States temporarily as a tourist, or temporarily for business or pleasure,"

and now seeks to remain in the United States, and claims the legal right so to do, by reason of the fact that petitioner has, in good faith, changed his status, as a non-immigrant, from that of a temporary visitor, under subdivision 2 of Section 3 of said Act, to that of a non-immigrant, as a treaty trader, under and pursuant to the provisions of subdivision 6 of Section 3 of said Act, which reads as follows:

"Section 3. When used in this Act, the term 'immigrant" means any alien departing from any place outside of the United States, destined for the United States, except (6) an alien entitled to enter solely to carry on trade under and in pursuance of the provisions of a present existing Treaty of Commerce and Navigation."

It is conceded that subdivision 6 of Section 3 of the Immigration Act of 1924, "ties in" the Treaty of Commerce and Navigation, entered into between the United States and the Empire of Japan, in 1911, the first article of which reads as follows:

"The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and *reside* in the territories of the other; to carry on trade, wholesale and retail; to own or lease and occupy houses, manufactories, warehouses and shops; to employ agents of their choice; to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

If petitioner had entered the United States as a treaty trader, under subdivision 6 of Section 3 of the

Immigration Act of 1924, it must be conceded that the petitioner would have the legal right to reside in the United States, as long as, and only so long as, the petitioner maintained his status as a non-immigrant, to-wit: a treaty trader.

A Japanese entitled to reside in the United States solely to carry on trade, under subdivision 6 of Section 3 of the Immigration Act of 1924, may under the Treaty employ agents of his choice, and generally do anything incident to, or necessary for trade, upon the same terms as a native citizen of the United States.

The employer of the petitioner, Mr. Inouye, concededly a Japanese treaty trader, is entitled, under the Treaty, to employ an agent of his choice, in connection with his business, and in the exercise of this treaty right, this treaty trader did employ the petitioner as Managing Agent of his business, and, in consequence, the petitioner likewise takes on the status of a treaty trader, and the question involved in this appeal is whether the petitioner is entitled to continue to remain in the United States as long, and only so long, as the petitioner maintains this treaty trader status.

The right to enter and reside in the United States, as a non-immigrant, under the Treaty of 1911, is not confined to those engaged in trade. It also includes employees or agents of treaty traders so engaged.

> "The Treaty with Japan, however, has not left the matter in doubt, for it is therein expressly provided that the Japanese subject would have the right 'to employ agents of their choice inci-

> dent to, or necessary for trade' (Article 1, Japanese Treaty of 1911), and that right is evidently vouch-safed with a view to the use of such of his fellow citizens as may be deemed by him to be, and are, in fact, reasonably necessary to carry on his trade or commerce."
>
> *Shizuko Kumanomido v. Nagle,* 40 Fed. (2nd) 42.

As it must be conceded that the appellant would have the right to enter, and to reside, in the United States, as a treaty merchant, had he been so originally admitted under subdivision 6 of Section 3 of the Immigration Act of 1924, does the fact that the appellant originally entered under subdivision 2 of Section 3 of said Act "temporarily for business or pleasure," and agreed to depart from the United States upon the expiration of his temporary visit, justify, or require his deportation, irrespective of the question of his change of status.

We expressly concede, since all of the authorities are unanimous on this point, that if the original entry into the United States, of the appellant, had been wrongful, he could not, by changing his status thereafter, and while wrongfully within the United States, acquire any right to remain within this country.

The entry of the appellant into the United States, however, was lawful, he having been admitted as a non-immigrant, pursuant to the provisions of subdivision 2 of Section 3 of the Immigration Act of 1924. While domiciled within the United States, the appellant, in good faith, changed his status as a non-immigrant from that of a temporary visitor, to that of a treaty trader.

The question therefore arises whether the appellant, after lawful admission into the United States, and while domiciled therein, in changing his status as a non-immigrant, from that of a temporary visitor, under subdivision 2 of Section 3 of the 1924 Act, to that of a treaty trader, under subdivision 6 of Section 3 of said Act, violated any law of the United States.

This is the crux of the entire matter. The only laws which are in any way applicable are the following sections of the Immigration Act of 1924:

> "DEPORTATION.
>
> Sec. 14. Any alien, who at any time, after entering the United States, is found to have remained therein for a longer time than permitted under this Act, or regulations made thereunder, shall be taken into custody and deported.
>
> MAINTENANCE OF EXEMPT STATUS.
>
> Sec. 15. The admission to the United States, of an alien excepted from the class of immigrants by clause (2), (3), (4), (5), or (6) of section 3, or declared to be a non-quota immigrant by subdivision (e) of section 4, shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clause (2), (3), (4) or (6) of section 3, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States."

The applicable rules and regulations of the Secretary of Labor, promulgated to carry into force and effect, the provisions of the 1924 Immigration Act, are as follows:

Rule 3. Subdivision H. Par. 1. "In cases where an alien claims to be visiting the United States temporarily as a tourist or temporarily for business or pleasure, if the examining officer is satisfied beyond a doubt of the applicant's status, he may temporarily admit such alien, if otherwise admissible, for a reasonable fixed period, under no circumstances to exceed one year, on condition that such alien shall maintain such status of a non-immigrant during his temporary stay in the United States and voluntarily depart therefrom at the expiration of the time fixed and allowed. * * *."

Rule 3. Subdivision H. Par. 2. "Where the examining officer is in doubt as to the alien's claimed status as a non-immigrant under subdivision 2 of section 3 of the Immigration Act of 1924, such alien shall be held for examination in relation thereto by a board of special inquiry, which board may temporarily admit such alien, if otherwise admissible, for a reasonable fixed period, under no circumstances to exceed one year, on condition that such alien shall maintain such status of non-immigrant during his temporary stay in the United States and voluntarily depart therefrom at the expiration of the time allowed. * * *."

Rule 3. Subdivision H. Par. 3. "Where the examining officer is satisfied beyond a doubt that an alien seeking to enter the United States as a non-immigrant, pursuant to subdivision 6 of sec-

> tion 3 of the Immigration Act of 1924, is entitled to enter solely to carry on trade under and in pursuance of a Treaty of Commerce and Navigation which existed on May 26, 1924, he may admit such alien, if otherwise admissible, on condition that such alien shall maintain such status of a non-immigrant during his stay in the United States, and upon failure or refusal to maintain such status that he will voluntarily depart. * * *"

Appellant was admitted into the United States as a non-immigrant, under subdivision 2 of Section 3 of the 1924 Act, as a temporary visitor, and agreed to depart from the United States, upon the expiration of the period granted. Did Congress, by the enactment of the above quoted sections (Sections 14 and 15) intend to violate the provisions of the Treaty of Commerce and Navigation, entered into between this country and the Empire of Japan, on February 21st, 1911, by declaring that *eo instante,* upon the expiration of the period under which the alien was temporarily admitted into the United States, the alien shall be "deemed to be unlawfully in the United States," thus prohibiting the alien from changing his status to a treaty trader.

There is no such express provision found in either Section 14, or Section 15, of the Immigration Act of 1924, and the question therefore arises whether Congress, in thus enacting the above quoted sections found in the 1924 Immigration Act, had clearly in mind, the construction of said sections which the Secretary of Labor attempts to place upon them, to-wit: that upon the expiration of the temporary period

under which appellant was admitted into the United States, he immediately was "deemed to be in the United States contrary to law," and subject to deportation, and any subsequent change of status from that of a non-immigrant, admitted as a temporary visitor, to that of a non-immigrant, as a treaty trader, was not permissible under any reasonable interpretation, either of the provisions of the 1924 Immigration Act, or of the provisions of the Treaty of Commerce and Navigation, entered into between this country, and the Empire of Japan, in 1911.

It is at this point that we disagree both with the decision of the Secretary of Labor, and with the decision of the learned judge of the Court below.

The correct solution of the question, we respectfully submit, requires not only a liberal construction and application of the provisions of the Immigration Act of 1924, and the applicable rules and regulations promulgated by the Secretary of Labor, but the applicable provisions of the 1911 Treaty must likewise be construed and applied to the facts of this case, since the 1924 Immigration Act itself provides that the term "immigration laws" includes all immigration acts, and all laws, conventions and treaties of the United States relating to the immigration, exclusion or expulsion of aliens. (Sec. 28-G.)

If, in construing the provisions of Sections 14 and 15 of the Immigration Act of 1924, this Honorable Court holds that the general language of the statute in question is broad enough to violate certain provisions of the 1911 Treaty heretofore quoted, and that

Congress had clearly in mind, such a result, when passing the Immigration Act of 1924, then, of course, appellant, upon the expiration of the period of his temporary visit in this country, was unlawfully within the United States, and he could not, by thereafter changing his status from a non-immigrant, under subdivision 2 of Section 3 of the 1924 Act, to that of a treaty trader, under subdivision 6 of Section 3 of said Act, acquire any right to remain therein.

We respectfully contend, however, that not only does it not clearly appear that Congress, in passing the Immigration Act of 1924, had in mind any such result, but that, on the contrary, Congress, in so passing said statute, did not intend in anywise to violate in this respect any of the provisions of the Treaty of 1911.

What great object did Congress have in mind when it passed the Immigration Act of 1924?

From a perusal of the 1924 Immigration Act, it is apparent that this Act classifies aliens seeking admission into and residence within the United States, into two general groups: (a) immigrants who are seeking admission as permanent residents, and (b) non-immigrants, who have only a temporary status, or a right to remain, dependent and contingent upon the conditions of admission.

The whole purpose and intent of the 1924 Act is to permanently maintain the respective status of aliens so admitted into the United States; the law being clear that under no circumstance can an alien admitted as a temporary visitor, thereafter, while resid-

ing here, change his status to that of a permanent resident.

The maintenance of this status, whether of permanent or temporary residence, is determined, under the 1924 Act, by the character of the visa issued to each alien by the respective consular agent, and the production of which, at the port of entry, is a condition precedent to the right of entry of an alien into this country.

Immigration visaes are issued to those aliens who, with but minor exceptions, are seeking admission into the United States for permanent residence, while passport visaes are issued to those aliens who are seeking admission under a temporary status.

Analyzing the provisions of the 1924 Immigration Act, exclusively from the standpoint of an alien Japanese, it is expressly declared that no such alien, being ineligible to citizenship, is admissible, save and except as he qualifies as a non-immigrant, pursuant to the provisions of Section 3, or as a non-quota immigrant, pursuant to the provisions of Section 4.

We expressly concede that no alien Japanese, entering the United States under a passport visa, pursuant to the provisions of Section 3, can, after his entry into the United States, change his status from that of a temporary visitor, to that of a permanent resident.

Both the letter and the spirit of the Act of 1924 so declares, and there can therefore be no controversy on that point.

Section 15 of the Act declares that any alien Japanese, admitted under the provisions of Section 3,

must, while lawfully residing in the United States, maintain the temporary status under which he was admitted, that is: as a non-immigrant, and Section 14 declares that any Japanese alien, who, at any time after so entering, under the provisions of Section 3 of said Act, remains in this country for a longer time than permitted, as such temporary visitor or non-immigrant, is subject to deportation by the affirmative act of the Secretary of Labor.

It is clear that the intent expressed in, and the object to be accomplished by, the provisions of, Sections 14 and 15 of the 1924 Immigration Act, is to prevent a Japanese alien, who has been admitted as a non-immigrant under a temporary status, to thereafter abandon such temporary status in an endeavor to acquire a permanent status, so that he may permanently reside within the United States, irrespective of the conditions under which he was originally admitted.

The pertinent rules and regulations issued by the Secretary of Labor, to carry into effect the provisions of the 1924 Act, are found in Immigration Rule 3, subdivision (h), paragraphs 1 and 3, heretofore quoted.

These rules are entitled to serious consideration as an interpretation of the provisions of the 1911 Treaty, by the Executive Department of our Government.

Paragraph 1 of said rule provides that when an alien seeks admission into the United States as a 3 (2), if the examining officer is satisfied beyond a doubt, of the applicant's status, he may temporarily

admit such alien "on condition that such alien shall maintain such status of a non-immigrant during his temporary stay in the United States"; while paragraph 3 provides that where a Japanese alien is seeking admission into the United States, as a 3 (6), or treaty trader, he will be admitted with the approval of the Examining Officer "on condition that such alien shall maintain such status of a non-immigrant during his stay in the United States."

It is apparent that under these rules a wide discretion is vested in the Immigration authorities at the time the alien seeks admission, pursuant to the provisions of Section 3, and if the authorities are not satisfied of the good faith of the applicant, admission will be denied, or admission may be granted upon the filing of a bond.

Nowhere in these immigration rules, or, in fact, in the 1924 Act itself, is there found any express provision to the effect that an alien admitted under subdivision 2 of Section 3 of the 1924 Act, who overstays his leave, *ipso facto,* "is deemed to be unlawfully in the United States."

Under Section 3 of the 1917 Immigration Act it is expressly provided that any alien from the barred zone, who is conditionally admitted, and who thereafter fails to maintain, in the United States, a status or occupation placing him within the excepted class "shall be deemed to be in the United States contrary to law," and shall be deported; while in Section 34 of said Act, it is likewise expressly provided that any alien seaman who shall land in a port of the United States, contrary to the provisions of the 1917 Act,

shall likewise "be deemed to be unlawfully in the United States."

Immigration rule 6, subdivision a, paragraph 5, likewise recites that any alien admitted into the United States as a 3 (3), and who overstays his leave, "shall be deemed to be unlawfully within the United States," and shall be deported; while in rule 7, subdivision i, paragraph 1, it is expressly provided that if a seaman overstays his leave of sixty days, he "shall be deemed to have abandoned his status as a non-immigrant," and may be deported; while in Immigration rule 10, subdivision d, paragraph 1, it is likewise provided that a student, admitted under Section 4 (e), who fails to maintain his temporary status, "shall be deemed to have abandoned his status as an immigration student," and shall be deported.

If Congress had intended, by the provisions of Section 14 of the 1924 Immigration Act, to make that section applicable to a case where a non-immigrant, lawfully admitted under one classification of Section 3 of said Act, and while domiciled within the United States, changed his status to another classification, as a non-immigrant, under said Section 3, Congress could have clearly expressed its intention by adding to this Section: "is deemed to be unlawfully in the United States."

The Secretary of Labor attempted to place such a construction upon Section 14 of the Act, so that instead of reading as it does, the Secretary of Labor reads into said section, the hereinbefore quoted sentence so as to make the section read as follows:

"Section 14. Any alien, who, at any time after entering the United States, is found to have remained therein for a longer time than permitted under this Act, or regulations made thereunder, shall be deemed to be unlawfully in the United States."

We respectfully submit that Congress had no such intention in mind at the time that the 1924 Immigration Act was enacted; the sole purpose of the enactment of Section 14 being to prevent the abandonment, by a non-immigrant, from his temporary status, as a non-immigrant, under which he was admitted, to that of a permanent resident.

Such an interpretation, we respectfully submit, will render said section in harmony with the provisions of the existing 1911 Treaty between this country and the Empire of Japan.

We are happy to say that in the case of *Dang Foo v. Day,* 50 Fed. (2d) 116, the Circuit Court of Appeals, for the Second Circuit, has construed Sections 14 and 15 of the 1924 Immigration Act, in consonance with our view on this subject, as hereinbefore expressed.

We quote from page 119 of said opinion:

"There was nothing to forbid his changing his status to that of a merchant. Non-immigrants, by the plain language of the statute, are entirely outside the general purposes of the law establishing quotas for immigrants, and there was nothing to forbid a member of any one of the six non-immigrant classes to become a member of any other one of such six classes. He came as a traveler or

visitor, which kept him out of the general purposes and scope of the quota law, and, after being admitted as a traveler, he became a merchant, and in doing this remained as a non-immigrant, and was still without the scope of the quota law. Under these circumstances, a bond should not have been required as long as he remained here and was not otherwise deported. This construction will keep the provisions of the 1924 act in harmony with the treaty.

Section 15 of the Immigration Act (8 USCA Sec. 215), permitting a bond to be exacted in cases of temporary visitors to insure their return at the expiration of the temporary period of admission or upon failure to maintain the status under which admitted, has no application to this appellant. The bond, now statutorily provided, has for its purpose insuring that a person, admitted as a non-immigrant (classes of which are described in section 3 of the 1924 act), shall maintain his status here as a non-immigrant, and obviously, so long as he does maintain that status and does not, by the adoption of an inhibited occupation or otherwise, become an immigrant, there can be no reason for requiring him to leave the country, for he is here under those circumstances not in excess of any quota allotted to any country by the statute or otherwise in derogation of any substantial purpose of the Legislature. This is not in conflict with the Chinese treaty. A Chinese or other alien who might enter as a temporary visitor, and who has no intention of becoming, while here, a member of any one of the six classes of non-immigrants entitled to remain longer, can be required to give a bond for his departure after

> completing a reasonable visit, if any reasonable doubt existed as to the bona fides of his express intention; while the alien who came as a temporary visitor and who expressed the intention to shift or later shifted into one of the other exempt classes, as, by becoming a merchant, would be allowed to remain as long as he maintained his exempt status as a non-immigrant treaty merchant. Thus the treaty would be effective and the 1924 Immigration Law applied to its fullest extent, accomplishing its purposes. * * * ''

If our contention that Congress, in passing Sections 14 and 15 of the 1924 Immigration Act, did not intend, or clearly say, that a non-immigrant, lawfully admitted into the United States, under Section 3 of said Act, and while domiciled therein, could not change his status, from one classification to another, under said Section 3 of said Act, but that the sole purpose of the passage of said sections of said Act was to prevent the abandonment, by a non-immigrant, of his temporary status, in an endeavor to acquire a permanent residence, is sound, then we respectfully submit that the case of *Metaxis v. Weeden,* 5459, decided by this Honorable Court on May 26th, 1930, is ''on all fours'' with the case at bar, and should be held to be a pertinent precedent in reaching a proper conclusion in the instant appeal.

The original opinion, in the *Metaxis* case, supra, was based upon the Treaty between this country and Greece, and it was because of the fact that Metaxis was entitled to a treaty trader status, under this Treaty, that the order of deportation was reversed.

Upon rehearing, it being ascertained that this Treaty between the United States and Greece had been abrogated in 1921, no treaty rights being therefore involved in the *Metaxis* case, the order of deportation was affirmed.

Since, in the case at bar, treaty rights are involved, we respectfully submit that the original opinion handed down in the *Metaxis* case, supra, is directly in point with the facts of the instant appeal.

The Secretary of Labor, by his decision rendered in the instant appeal, held that petitioner's stay in the United States, after the six month period had expired, became *eo instante* unlawful, the reason apparently being that immediately upon the expiration of said temporary visit, as a non-immigrant, the petitioner conclusively evidenced his intention of abandonment of his status, as a non-immigrant, by remaining in the United States, during the hiatus after the period of his temporary status had expired, and prior to his acquisition of the status of a non-immigrant as a treaty trader.

This contention is based upon the assumption that petitioner, in overstaying his leave, did abandon his exempt status as a non-immigrant, and, in consequence, the provisions of Sections 14 and 15 of the 1924 Act became immediately applicable.

The best answer to this contention is that the petitioner did not abandon his exempt status, as a non-immigrant, but simply changed his classification as to his exempt status, from a 3(2) to a 3(6).

If the reason of the Secretary of Labor, that the residence of the petitioner in the United States, the moment after the period of his temporary admission had expired, thereupon became unlawful, is sound, then the same argument would apply to an alien who is admitted as a 3(6), and while lawfully residing in the United States abandons one line of business endeavor to engage in another. During a fraction of time this 3(6) alien would not be connected with any business endeavor in this country and, according to the contention of the Secretary of Labor, during this brief period, ipso facto, this 3(6) alien would be unlawfully in the United States, and subject to deportation, even though the best evidence that he did not intend to abandon his temporary status was the fact that immediately after severing his old business relationship, he assumed the new business connection. We respectfully submit that such an interpretation would be entirely out of harmony with the provisions of the 1911 Treaty existing between this country and the United States.

The learned judge of the Court below, in its opinion, attempts to differentiate the facts of the original opinion handed down in the *Metaxis* case, supra, from the case at bar, because of the fact that Metaxis, *immediately* upon his entry into the United States, as a 3(2), entered into partnership with his brother in the mercantile business, whereas in the case at bar, the petitioner did not change his status from a 3(2) to a 3(6) until after the expiration of the six month period.

We respectfully submit that the question of the time of the change of status is a false quantity, the real point for decision being whether or not a non-immigrant, lawfully admitted into the United States can, during his residence therein, lawfully change his status as such non-immigrant, from one classification to another, under Section 3 of the 1924 Act. If anything, the *Metaxis* case, on this particular point, is weaker than the case at bar, since the fact that Metaxis immediately upon his entry into this country, as a 3(2), changed his status to a 3(6), thereby evidenced a possible fraudulent intention in seeking entry into this country.

The opinion handed down by the learned judge of the Court below, bases its conclusion that petitioner, *eo instante,* upon the expiration of the six month temporary period, was, and continued to be, unlawfully within the United States, upon the premise that no right to continued residence within the United States can arise from a mercantile occupation, or status entered into during unlawful residence in continental United States, and cites in support of its premise, various authorities.

We respectfully submit that an analysis of the cited authorities does not support the premise upon which the said conclusion is based; on the contrary, an analysis of these various authorities will show that the true rule laid down in these authorities is that no right to continued residence within continental United States can arise from a mercantile occupation or status entered into during residence in continental

United States, based upon an original unlawful entry into our country.

The opinion cites the *Sugimoto* case, the *Wong Gar Wah* case, the *Wong Mon Lun* case, the *Wong Fat Shuen* case, the *Ewing Yuen* case, and *In Re Low Yin* in support of the premise that the petitioner was unlawfully in the United States at the time that petitioner changed his status from that of a temporary visitor to that of a treaty trader.

We respectfully submit that an analysis of these various citations conclusively demonstrates that not one of them is applicable to the facts of the instant appeal.

The principle laid down in the *Sugimoto* case is that an ineligible alien who unlawfully enters continental United States cannot, by changing his status from that of a laborer, to that of a merchant, acquire any re-entry rights under the 1924 Immigration Act.

In the case of *Wong Gar Wah* no question of change of status was involved. The Court laid down the broad general principle that where the law makes the recitals in certificate No. 6, as the sole evidence of the right of an alien to enter and remain in the United States, the Courts are bound by the recitals in such a certificate.

In the *Wong Mon Lun* case the facts show that the applicant originally entered the United States on September 11th, 1923, and was admitted as a Chinese merchant in possession of a No. 6 certificate. The applicant remained in San Francisco, as a merchant,

until his return to China in 1927, and sought to re-enter in April of 1928 under a re-entry permit.

The alien was ordered deported on the ground that his re-entry was unlawful, since his original entry was fraudulent, and since a re-entry permit can be used only by an alien originally lawfully admitted, the permit having been obtained illegally, it was no basis for a legal re-entry.

In the course of its opinion this Honorable Court says:

> "And we have held that one who enters the United States fraudulently and unlawfully, acquires no right from the occupation in which he afterwards engages during a residence thus unlawfully initiated and maintained."

The *Wong Fat Shuen* case, we respectfully submit, has no bearing on the facts of the instant appeal, since it is simply a reaffirmance of the doctrine enunciated in the *Wong Mon Lun* case, supra, that an alien who surreptitiously and in violation of law, enters our country, cannot, after such entry, acquire an exempt status by engaging in business as a merchant. The same principle is enunciated in the case of "In re Low Yin," being simply a reaffirmance of the rule laid down in the *Wong Mon Lun* case.

The learned Judge of the Court below, we feel certain, was influenced to a great extent, in reaching his decision that the writ should be denied, from the opinion in the *Ewing Yuen* case, since the Court, in its opinion, adopts as its own, a portion of the opinion of the *Ewing Yuen* case.

The facts of the *Ewing Yuen* case are in no wise applicable to the facts of the instant appeal. No treaty rights were involved in the *Ewing Yuen* case, as expressly appears from the opinion. The principle enunciated is simply a forerunner of the rule laid down by this Honorable Court, in the *Wong Gar Wah* case, supra, as well as in the rehearing opinion in the *Metaxis* case, supra.

CONCLUSION.

We have, therefore, this situation:

Petitioner was lawfully admitted into the United States as a non-immigrant, under subdivision 2 of Section 3 of the Immigration Act of 1924, and while domiciled within our country, pursuant to said lawful admission, changes his status as such non-immigrant, from a temporary visitor, to that of a treaty trader.

The petitioner contends that in shifting his status from a temporary visitor, to a treaty trader, he violated no laws of the United States, since he still remains within the exempt class as a non-immigrant, and that as long as petitioner maintains his exempt status of a non-immigrant, no provision of the 1924 Immigration Act demands his deportation.

Petitioner further contends that nothing in the 1924 Immigration Act prohibits an ineligible alien, lawfully admitted into the United States, under Section 3 of said Act, during his residence therein, to change his status from one or the other of the classifications specified in Section 3 of said Act.

Petitioner further contends that such construction should be placed upon the Immigration Act of 1924, since such a construction will preserve the provisions of the 1911 Treaty existing between this country and the Empire of Japan.

That while Congress may abrogate the provisions of an existing treaty, by subsequent legislation on the subject, such intent on the part of Congress to so violate the provisions of such a treaty must clearly appear, and the Courts are not inclined to hold that Congress has so intended to violate the provisions of an existing treaty unless the intent so to do is free from all ambiguity.

In conclusion we respectfully submit that the petitioner, in so changing his status as a non-immigrant, from that of a temporary visitor, under which he was admitted, to that of a treaty trader, having violated no law of the United States, the judgment of the lower Court is erroneous, and should be reversed, and the petitioner permitted to reside within the United States as long as, and only so long as, the petitioner continues to maintain his status as such a non-immigrant.

Dated, San Francisco,
November 7, 1931.

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No. 6538

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TATSUMI MASUDA,
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,
Appellee.

BRIEF FOR APPELLEE.

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Table of Contents.

	Page
STATEMENT OF THE CASE	1
FACTS OF THE CASE	1
THE ISSUE	2
ARGUMENT	3
I. At the expiration of six months after entry appellant was unlawfully in the United States and subject to immediate deportation	3
II. Appellant gained no right to remain in the United States by assuming the occupation of a trader while unlawfully here	8
APPELLANT'S ARGUMENT	17
THE DANG FOO CASE	20
CONCLUSION	26

Table of Authorities

Pages

Chun Shee v. White (C. C. A. 9) 9 F. (2d) 342 15
Dang Foo v. Day, 50 F. (2d) 116 ..... 20, 21, 24
Dang Foo v. Weedin, (C. C. A. 9) 8 F. (2d) 221 ..... 22, 24
Ewing Yuen v. Johnson, 299 Fed. 604 ..... 9, 10
Ex parte Wu Kao, 270 Fed. 351 12
Fok Yung Yo v. United States, 185 U. S. 296 15
Goldsmith v. United States, (C. C. A. 2), 42 F. (2d) 133 at 136, 137 15
In re Low Yin, 13 F. (2d) 265 ..... 9, 11
Jeu Jo Wan v. Nagle, 9 F. (2d) 309 ..... 6, 23, 25
Kaichiro Sugimoto v. Nagle, (C. C. A. 9) 38 F. (2d) 207; certiorari denied, 281 U. S. 745 ..... 9, 10
Metaxis v. Weedin, No. 5947, decided May 26, 1930 17
Metaxis v. Weedin, 44 F. (2d) 539 ..... 17, 18
Ng Fung Ho v. White, 259 U. S. 276 at 281 ..... 9, 12
Takao Ozawa v. U. S., 260 U. S. 178; 43 S. Ct. 65; 67 L. Ed. 199 3
Tulsidas v. Insular Collector of Customs, 262 U. S. 258 9
United States ex rel. Orisi v. Marshall, (C. C. A. 3), 46 F. (2d) 853 8
United States ex rel. Komlos v. Trudell, 35 F. (2d) 281 16
United States ex rel. Graber v. Karnuth, (C. C. A. 2), 30 F. (2d) 242 16
United States ex rel. London v. Phelps, (C. C. A. 2), 22 F. (2d) 288 16
United States ex rel. Johansen v. Phelps, 14 F. (2d) 679 16
United States ex rel. Graber v. Karnuth, 29 F. (2d) 314 16
Wong Fat Shuen v. Nagle (C. C. A. 9), 7 F. (2d) 611 9
Wong Gar Wah v. Carr, (C. C. A. 9), 18 F. (2d) 250, certiorari denied, 275 U. S. 529 ..... 7, 8, 9, 13, 23, 25
Wong Mon Lun v. Nagle, (C. C. A. 9) 39 F. (2d) 844 ..... 9, 12

No. 6538

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TATSUMI MASUDA,
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JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This appeal is from an order of the District Court for the Southern Division of the Northern District of California denying appellant's petition for writ of habeas corpus (Tr. 33).

FACTS OF THE CASE.

The appellant was admitted into the United States on July 13, 1928, "as a temporary visitor for a period

of six months'' (Respondent's Exhibit A, p. 5; Tr. p. 2).

At the expiration of the period of six months for which he was admitted he did not depart from the United States and made no application for an extension of his temporary admission. On March 1, 1929, nearly eight months after his temporary admission, and about two months after his temporary permission had expired he took up employment as a bookkeeper with Z. Inouye, a merchant at Sacramento. On May 1, 1929, nearly ten months after his temporary admission and about four months after his temporary permission had expired, he became manager of the firm of Z. Inouye and Company (Tr. pp. 3 and 4).

On July 18, 1930, deportation proceedings were instituted against him (Respondent's Exhibit A, p. 3), and after hearing he was ordered deported by the Secretary of Labor under the Immigration Act approved May 26, 1924, on the following ground:

> ''That he has remained in the United States for a longer time then permitted under the said act or regulations made thereunder.'' (Respondent's Exhibit A, p. 44)

THE ISSUE.

The sole question is whether an alien who is unlawfully in the United States and subject to deportation may, while so unlawfully in the United States, obtain

a right to remain as a trader by taking up a mercantile occupation.

ARGUMENT.

We shall show: first, that at the expiration of six months after his entry on July 13, 1928, appellant was unlawfully in the United States and subject to immediate deportation; and, second, that appellant could gain no right to remain in the United States by assuming a trader's occupation while unlawfully in the country.

I.

AT THE EXPIRATION OF SIX MONTHS AFTER ENTRY APPELLANT WAS UNLAWFULLY IN THE UNITED STATES AND SUBJECT TO IMMEDIATE DEPORTATION.

Let us first consider the pertinent statutory provisions.

Section 13 of the Immigration Act, approved May 26, 1924, (8 U. S. C. A., Sec. 213) provides:

> "No alien ineligible to citizenship shall be admitted to the United States unless such alien * * * is not an immigrant as defined in Section 3."

Appellant, being a person of Japanese race, (Respondent's Exhibit A, p. 9) is an alien ineligible to citizenship.

> *Takao Ozawa v. United States,* 260 U. S. 178; 43 S. Ct. 65; 67 L. Ed. 199.

We turn then to Section 3 of the Act (8 U. S. C. A., Section 203) defining the classes of aliens who are not immigrants. That section provides:

> "When used in this act the term 'immigrant' means any alien departing from any place outside of the United States destined for the United States, except (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure."

That is the provision under which appellant was admitted into the United States on July 13, 1928.

The conditions and limitations of that admission are expressly stated in Section 15 of the Act (8 U. S. C. A., Sec. 215) which provides as follows:

> "The admission to the United States of an alien excepted from the class of immigrants by clause (2) * * * of Section 3 * * * shall be for *such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed* * * * to insure that, at the *expiration of such time* or upon failure to maintain *the status under which admitted* he will depart from the United States."

The regulation authorized by that section and by Section 24 of the Act (8 U. S. C. A., Sec. 222) provides as follows:

> "In cases where an alien claims to be visiting the United States temporarily as a tourist or temporarily for business or pleasure, if the exam-

> ining officer is satisfied beyond a doubt of the applicant's status, he may temporarily admit such alien, if otherwise admissible, for a reasonable *fixed period,* under no circumstances to exceed one year, on condition that such alien shall maintain such status of a non-immigrant during his temporary stay in the United States and voluntarily depart therefrom at the expiration of the time fixed and allowed." (Immigration Rule 3—Subdivision H, par. 1.)

Appellant was admitted for the fixed period of six months (Respondent's Exhibit A, p. 5; Tr. p. 2).

What then was appellant's situation when this six months' period expired?

Under the express provisions of Section 14 of the Act he was subject to immediate deportation. That section provides (8 U. S. C. A., Sec. 214):

> "Any alien who at any time after entering the United States is found * * * to have remained therein for a longer time than permitted under this act or regulations made thereunder, shall be taken into custody and deported. * * * "

At this point we might invite attention to the fact that Immigration Rule 25, subdivision C, permits the filing of an application to extend the time of temporary admission. That regulation provides further that,

> "Applications for extensions shall not be granted except in cases where the reasons given are persuasive and in no instance where an applicant who

> has been admitted temporarily for business or pleasure has taken up employment or employment different from that for which admitted, or it is apparent that it is the applicant's desire to remain permanently in the United States."

Appellant did not avail himself of this privilege of making application for an extension at the time of the expiration of his temporary stay and, therefore, it is obvious that on the expiration of the six months period for which he was admitted he became immediately subject to deportation under the express provisions of Section 14, supra.

Appellant makes frequent allusion to the Treaty of Commerce and Navigation entered into between the United States and the Empire of Japan on February 21, 1911. It is only necessary to point out that the rights of appellant are measured by the Immigration Act of 1924 and that the only treaty rights preserved by that Act are those mentioned in Section 3 (6) thereof, which excepts from the classification of "immigrant",

> "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." (8 U. S. C. A., Sec. 203 (6).)

The effect of the Immigration Act of 1924 on existing treaty rights is clearly settled by the decision of this court in

Jeu Jo Wan v. Nagle, 9 F. (2d) 309.

In that case the appellant, a Chinese teacher, presented a teacher's certificate which was admittedly sufficient to entitle him to an entry into the United States under the Chinese Treaty and the Chinese Exclusion Act. He was denied admission on the ground that he had not brought himself within the exceptions to the excluding provisions of the Immigration Act of 1924. The court considered the effects of Sections 25 and 28 of the Act (8 U. S. C. A., Secs. 223 and 224 (g)) upon existing treaty rights and said:

> "It will thus be seen that the Immigration Act of 1924 abrogates all laws, conventions and treaties relating to the immigration, exclusion, or expulsion of aliens, inconsistent with its provisions, and that *the only* treaty rights preserved are those relating to aliens entitled *to enter* the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

See also,

> *Wong Gar Wah v. Carr,* (C. C. A. 9) 18 F. (2d) 250, (certiorari denied, 275 U. S. 529).

There is no contention here that *at the time of his entry* appellant was an alien entitled to enter solely to carry on trade. Nor is it contended that he was a trader at the expiration of the six months period for which he was allowed to enter as a visitor. At that time his temporary rights as a visitor had expired and he was subject to deportation under the express pro-

visions of Section 14 of the Immigration Act of 1924.

Wong Gar Wah v. Carr, supra;
United States ex rel Orisi v. Marshall, (C. C. A. 3) 46 F. (2d) 853.

His sole contention is that *four months after the period of his temporary admission expired* he entered into a trading occupation and that he thereby gained a right to remain under Section 3 (6) of the Act, as one entitled to enter solely to carry on trade under and in pursuance of the provisions of a treaty of commerce and navigation.

As we have shown above, appellant was subject to deportation immediately after the expiration of his six months period. It is admitted that he was not then a trader. It is not disputed that he could have been deported at any time thereafter up to the time he entered into the mercantile occupation. We are therefore brought back to the sole question whether an alien who is unlawfully in the United States and subject to deportation can remain therein by taking up an exempt occupation.

II.

APPELLANT GAINED NO RIGHT TO REMAIN IN THE UNITED STATES BY ASSUMING THE OCCUPATION OF A TRADER WHILE UNLAWFULLY HERE.

The authorities are unanimously to the effect that where an alien is unlawfully in the United States he

can not gain any right of continued residence therein by taking up an exempt occupation.

Kaichiro Sugimoto v. Nagle, (C. C. A. 9), 38 F. (2d) 207; certiorari denied, 281 U. S. 745;
Wong Gar Wah v. Carr, supra;
Wong Mon Lun v. Nagle, (C. C. A. 9) 39 F. (2d) 844;
Wong Fat Shuen v. Nagle, (C. C. A. 9) 7 F. (2d) 611;
Ewing Yuen v. Johnson, 299 Fed. 604;
In re Low Yin, 13 F. (2d) 265.

Appellant concedes this principle but he attempts to make a distinction on the ground that his *entry* was not unlawful. But in

Ng Fung Ho v. White, 259 U. S. 276, at 281,

the Supreme Court said:

"One who has entered lawfully may remain unlawfully."

In

Tulsidas v. Insular Collector of Customs, 262 U. S. 258,

in interpreting certain provisions of the Immigration Act of 1917, the Supreme Court said:

"The law defines the classes of aliens who shall be excluded from admission to the United States, but provides that the exclusion shall not apply to persons having the status or occupations of 'mer-

chants'. This means, necessarily, *having the 'status' at the time admission is sought, not a status to come or to be established.''*

In

Kaichiro Sugimoto v. Nagle, supra,

the appellant was *admitted* into the United States, but his admission was limited as to place, i. e., he was admitted into Hawaii but not to the Continental United States. In the case at bar appellant's admission was limited as to time. Sugimoto violated the limitation of his admission by proceeding to the Continental United States, after which he took up an exempt occupation by engaging in business. Appellant here violated the limitation of his admission by remaining beyond the fixed period of six months, after which he took up an alleged exempt occupation. We submit that there is no distinction in principle. In the Sugimoto case this court said:

> "At the time of his original entry he was a laborer, and the fact that during his residence in California he changed his occupation from that of laborer to that of merchant does not change the situation so far as his admissibility is concerned. (Citing *Tulsidas v. Insular Collector of Customs,* supra; and *Wong Fat Shuen v. Nagle,* supra.)''

In

Ewing Yuen v. Johnson, supra,

the court said:

> "He applied for and *obtained temporary admission* under the immigration laws as an alien

> otherwise inadmissible. He entered into a solemn obligation with the authorities representing the United States Government to depart within six months. *At the expiration of that period his stay within the United States was unlawful.* * * * He is not helped by the fact that since coming to the United States he has acquired the status of a merchant. (Citing *Tulsidas v. Insular Collector of Customs,* supra.)"

In the case of

In re Low Yin, supra,

the petitioner was a seaman and at the time of his entry was entitled to temporary admission as a non-immigrant under Section 3 (5) of the Immigration Act of 1924. In that case the court said:

> "While it is true that the alien was allowed to land, it is equally true that he was not then admissible, and could only have been admitted temporarily. This temporary admission was neither sought nor granted. If we assume that since his arrival he has acquired the status of a merchant, we do not help the alien, because it is well settled that the right to come into and remain in the United States depends upon the status *at the time of entry. Tulsidas v. Insular Collector,* 262 U. S. 258, 43 S. Ct. 586, 67 L. Ed. 969; *Ewing Yuen v. Johnson* (D. C.) 299 F. 604."

Obviously an alien who obtains entry for a temporary fixed period as a visitor, and although subject to deportation by express terms of the Act at the expira-

tion of that fixed period, clandestinely remains in the country after said period has expired, is thereafter unlawfully in the United States just as much as if his original entry had been clandestine and unlawful.

Ng Fung Ho v. White, supra.

In

Wong Mon Lun v. Nagle, supra,

this court held that,

> "one who enters the United States fraudulently and unlawfully acquires no right from the occupation in which he afterwards engages during a residence thus unlawfully initiated and maintained."

We do not contend that appellant *entered* unlawfully, but "one who has entered lawfully may *remain* unlawfully," and we do contend that when appellant remained in the United States beyond the fixed period of six months for which he had been admitted, he was then unlawfully here. It can not be denied that he could have been instantly deported under the express terms of Section 14 of the Act.

In

Ex parte Wu Kao, 270 Fed. 351,

the petitioner sought admission as a person entitled to enter under the Chinese treaty and exclusion laws, but his application for admission was denied. On appeal to the Department, however, he was granted permission to enter temporarily for a period of one year

on condition that a recognizance be given to secure his appearance at the expiration of one year. Thereafter the petitioner engaged in a mercantile business and sought to remain on that ground, since under the Chinese treaty and the Chinese Exclusion Act merchants are an exempt class. The court said:

> "Since the petitioner was not admitted, he is not entitled to residential rights, and he may not plead an exempt status which he acquired during the probationary period. What he did in endeavoring to establish a mercantile status was in fraud of the department and out of harmony with the stipulation and recognizance of the temporary admission. Being engaged in such enterprise without residential right, no residential status obtained, and no vested right could follow, as was held by this court in Ex parte Mac Fock, D. C. 207 Fed. 796. In this case the court said, at page 698: 'No lapse of time could ripen such a wrong into a right nor afford a basis upon which to predicate abuse of discretion.' "

Again in

> *Wong Gar Wah v. Carr* (C. C. A. 9), 18 F. (2d) 250,

the appellant had been admitted as a visitor, as was the appellant here. He sought to remain on the ground that he had become a merchant and trader. Circuit Judge Rudkin said:

> "From the foregoing statement it seems quite apparent that the appellant is in the country with-

> out right. As a merchant, the certificate is made the sole evidence of his right to enter or remain, and he has no such certificate. On the other hand, *such temporary rights as he acquired by the traveler certificate have long since expired by lapse of time and he is subject to deportation under the express provisions of section* 14 *of the Immigration Act of* 1924."

In the case at bar appellant, of course, would not be required to produce the certificate required by the Chinese Exclusion Act. But production of a visa of an American consular officer certifying his status as a non-immigrant trader is a prerequisite of admission under such status.

The Passport Act of May 22, 1918, as extended by the Act of March 2, 1921 (8 U. S. C. A., Sec. 227) empowers the President to impose restrictions upon the entry of aliens by proclamation. By Executive Order No. 4813 promulgated by President Coolidge on February 21, 1918, non-immigrants are required to present passports "duly visaed by consular officers of the United States". Regulations of the Department of State (No. 926, General Instruction Consular—Diplomatic Serial No. 2731, pages 16 and 17) provide as follows:

> "Consuls will exercise special care in handling cases arising under section 3 (6) of the act, which relates to aliens 'entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.' * * *

"While the department desires that consuls should extend every proper facility to aliens clearly coming within the purview of the statute and treaties, it considers it equally important that they should avoid granting visas to aliens wrongfully claiming rights thereunder.

"In order to obtain a visa under the statutory and treaty provisions referred to the applicant must show that he is going to the United States in the course of a business which involves, substantially, trade or commerce between the United States and the territory stipulated in the treaty

* * * * * * *

"Consuls are authorized, in their discretion, to require applicants for visas as non-immigrants, within the category mentioned, to present documentary evidence that they, in fact, belong thereto."

Rules prescribed by the Department pursuant to law have the force and effect of law.

Fok Yung Yo v. United States, 185 U. S. 296;
Chun Shee v. White (C. C. A. 9th), 9 Fed. (2d) 342.

A visa under § 3 (6) of the Immigration Act of 1924, therefore, can only be issued after determination by a consular officer that the applicant is of the class entitled thereto.

Lack of such non-immigrant visa of itself precludes entry as a non-immigrant.

Goldsmith v. U. S. (C. C. A. 2), 42 F. (2d) 133, at 136, 137;

U. S. ex rel. Komlos v. Trudell, 35 F. (2d) 281;
U. S. ex rel. Graber v. Karnuth, 30 F. (2d) 242 (C. C. A. 2);
U. S. ex rel. London v. Phelps (C. C. A. 2), 22 F. (2d) 288.

The issuance of such a visa is not a ministerial act, but involves discretion on the part of the consular officer.

U. S. ex rel. London v. Phelps (C. C. A. 2), 22 F. (2d) 288;
U. S. ex rel. Johansen v. Phelps, 14 F. (2d) 679;
U. S. ex rel. Graber v. Karnuth, 29 F. (2d) 314.

We submit that appellant could gain no rights of continued residence in the United States by taking up the occupation of a trader several months after the period of his temporary admission expired, for two reasons: First, because at the time of taking up said occupation his presence in the United States was in violation of law and he was then, and had been for some time previous thereto, subject to immediate deportation upon apprehension, and, secondly, because the statutes and the proclamation issued thereunder require a consular visa as a trader as a prerequisite to admission as such

APPELLANT'S ARGUMENT.

Appellant contends that the law and regulations do not expressly state that after the expiration of the period fixed an alien visitor "shall be deemed to be unlawfully in the United States". The act of 1924 specifically says that the admission is for such time as may be by regulations prescribed to insure that *at the expiration of such time* he will depart from the United States (8 U. S. C. A., Sec. 215). The regulations prescribe "a reasonable *fixed* period, under no circumstances to exceed one year" (Immigration Rule 3, subdivision H). The act further provides that any alien found to have remained *longer than permitted under the act and regulations,* shall be deported (8 U. S. C. C. A., Sec. 214). Aliens who are lawfully in the United States are not deported. We fail to see how the act and regulations could have limited the lawful stay of a temporary visitor more specifically.

Under the sections of the act and the regulations above cited there can be no doubt that appellant at the expiration of six months from the date of his entry became immediately subject to deportation. Further stay was not permitted by the act and regulations, and hence in staying beyond that six months he violated sections 14 and 15 of the act and rendered himself instantly subject to deportation.

Petitioner cites a decision of this court rendered on May 26, 1930, in the case of

Metaxis v. Weedin, No. 5947,

which decision the court later reversed on rehearing (*Metaxis v. Weedin,* 44 F. (2d) 539).

The facts in the *Metaxis* case, and the law applicable thereto, are entirely different from those in the case at bar.

In the *Metaxis* case the appellant was admitted on February 11, 1924, for a period of six months under the Quota Act of 1921, as amended in 1922 (42 Stat. 5, 540). When the present Immigration Act of 1924 was enacted on May 26, 1924, his presence in the United States was still lawful. His six months had not expired. The new act of 1924 excepted from the class of immigrants:

> "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

This court in the first opinion held:

> "If his original entry had been wrongful he could not by changing his status thereafter, and *while wrongfully within the United States,* acquire a right to remain therein. (Sugimoto v. Nagle, 38 F. (2d) 207.) Here, however, his *entry was legal* and his change of status made *in good faith.* No law has been violated by his change."

The holding of the court in the first opinion in the *Metaxis* case was that a treaty merchant could remain,

> "where his original entry was lawful, *and his change of status was not unlawful.*"

Furthermore, in the *Metaxis* case it appeared that the appellant changed his status, *"during his temporary visit"*. Hence he was not wrongfully within the United States when he took up the mercantile occupation, and the change was made in good faith. The deportation provisions of the Immigration Act of 1924 did not apply to Metaxis because he entered prior to the enactment of that act. The court said further:

> "No law has been violated by his change, but he did agree to leave within six months and that period has expired. The Secretary of Labor, however, is not empowered to enforce such an agreement by deportation. This power to deport aliens is based upon section 19 of the Immigration Act of 1917. * * * The appellant does not come within the provisions of this section."

In the case at bar the Secretary of Labor, by the Act of 1924, *is* empowered to deport upon failure of an alien to depart within the time for which he was admitted. That power in this case does not rest upon Section 19 of the Immigration Act of 1917 under which deportation was sought in the *Metaxis* case. It is expressly conferred by Section 14 of the subsequent Immigration Act of 1924. Furthermore, appellant here was "wrongfully in the United States" when he took up his claimed exempt occupation.

What of his "good faith"?

> "Q. Did you not understand that it would be unlawful for you to engage in any employment

in view of the fact that you had been admitted to the United States as a visitor?

A. Yes, I knew it was unlawful."

(Respondent's Exhibit A, p. 8.)

We submit therefore that the present case is in no respect analogous to the *Metaxis* case either on the facts or on the statutes applicable. Metaxis was not unlawfully within the United States when he took up a mercantile occupation. Petitioner was unlawfully in the United States from and after January 13, 1929, and did not take up the alleged exempt status until about four months thereafter. To what extent he was in good faith is conclusively established by the record.

We are brought back, therefore, to the question whether an alien while unlawfully in the United States and subject to deportation can acquire a right to remain by taking up an exempt occupation. We submit that under all the authorities, including the Metaxis opinion relied upon by petitioner, that question must be answered in the negative.

THE DANG FOO CASE.

Appellant cites the case of

Dang Foo v. Day, 50 F. (2d) 116.

The rights of Dang Foo have been the subject of extensive litigation before this and other courts.

A brief outline of the history of this litigation may be helpful to a clearer understanding of the case. Originally Dang Foo appealed to this court from an order of the District Court for the Western District of Washington denying his petition for a writ of habeas corpus. This was at the time he first applied for admission to the United States. This court on appeal reversed the order of the District Court (*Dang Foo v. Weedin,* 8 F. (2d) 221). Pursuant to that judgment Dang Foo was admitted into the United States. Thereafter he embarked in business as a merchant in New York and later applied for an extension of his temporary permit, which was granted by the immigration authorities on condition that he give a bond guaranteeing his departure six months thereafter. The bond was furnished and on his failure to depart was ordered forfeited. He thereupon filed a bill in equity in the District Court for the Southern District of New York, wherein he prayed for an injunction restraining the forfeiture of the bond. The bill was dismissed in the District Court. That judgment was reversed on appeal, with Circuit Judge Swan dissenting.

Dang Foo v. Day, 50 F. (2d) 116.

It is upon the last mentioned opinion that appellant relies.

Let us now consider the decision of this court ordering his discharge on habeas corpus. At the time of his arrival at Seattle, Dang Foo presented a trav-

eler's certificate issued under Article 2 of the Treaty with China (22 Stat. 826, 827), and under Section 6 of the Chinese Exclusion Act of May 6, 1882, as amended (8 U. S. C. A., Sec. 265). Under the treaty and the Exclusion Act, therefore, he was admissible as a traveler and the traveler's certificate was made "prima facie evidence of the facts set forth therein * * * but said certificate may be contraverted and the facts therein stated disproved by the United States authorities" (8 U. S. C. A., Sec. 265). So far as the Immigration Act of 1924 was concerned, he was entitled to enter temporarily as a visitor under Section 3 (2) thereof (8 U. S. C. A., Sec. 203 (2)).

The immigration authorities denied Dang Foo admission on the ground that he was not a bona fide traveler. He then petitioned the District Court for the Western District of Washington for a writ of habeas corpus which was denied. On appeal to this court the order denying his petition for writ was reversed (*Dang Foo v. Weedin,* 8 F. (2d) 221). In that opinion His Honor Judge Rudkin held that there was no evidence tending to contravert the prima facie effect of the traveler's certificate. The court also pointed out that nothing contained in the Immigration Act of 1924 impaired the effect of the certificate.

We turn now to the decision of the Circuit Court of Appeals for the Second Circuit in the equitable action, upon which decision appellant relies.

It will be observed in the first place that in that case "no period of his allowed stay was fixed at the time of his admissions by either court or the immigration officials." Hence it did not appear that at the time he embarked in business as a merchant he was unlawfully here by reason of having remained longer than the time for which admitted. Hence that decision does not reach the particular question involved in the case at bar. In the second place we submit that the majority opinion in the Dang Foo case is in direct conflict with the holdings of this court. The majority opinion seems to hold that a traveler is, because of the Chinese Treaty, entitled to remain indefinitely notwithstanding the restrictions imposed by the Immigration Act of 1924.

In the case of

Wong Gar Wah v. Carr, supra,

this court held that the rights of a Chinese traveler were temporary and that on the expiration of the period for which he was admitted, "he is subject to deportation under the express provisions of Section 14 of the Immigration Act of 1924" notwithstanding the fact he had become a merchant. In that case this court also considered the contention that the treaty rights were controlling, and discarded it on authority of its decision in *Jeu Jo Won v. Nagle,* supra.

The case of *Jeu Jo Won v. Nagle,* as we have pointed out above, directly held that the only treaty rights preserved by the Immigration Act of 1924 are those

relating to aliens entitled to enter solely to carry on trade, and that the rights of the appellant were measured by the Immigration Act of 1924. His Honor Judge Rudkin in that case also pointed out that such a construction was not in conflict with the decision of this court in the case of *Dang Foo v. Weedin,* supra, and other decisions, because in those cases it was merely held that the Immigration Act of 1924 does not exclude merchants or travelers. The Act still permits the entry of those classes, not because the treaty is paramount (an alien although admissible under a treaty shall not be admitted if he is excluded by any provision of the Immigration Act of 1924, see Sections 25 and 28 G (8 U. S. C. A. 223, 224 G)), but because the Immigration Act of 1924 expressly permits the entry of those particular classes under the limitations imposed by Sections 3, 14 and 15.

Hence it is obvious that Dang Foo, although in possession of a traveler's certificate which had not been contraverted, was entitled to enter only by virtue of Section 3 (2) of the Act, and that such entry was for a limited time by reason of Sections 14 and 15 of the Act. That is the view taken by this court in the decisions we have cited above, and is the view which was taken by Circuit Judge Swan in his dissenting opinion in the case of *Dang Foo v. Day,* supra.

We submit therefore that the case of *Dang Foo v. Day,* is not in point because it did not appear in that case that the period of temporary admission had ex-

pired before Dang Foo assumed his mercantile occupation. Furthermore, the decision overlooks the provision in Section 25 of the Immigration Act of 1924 (8 U. S. C. A., Sec. 223) that "an alien, although admissible under the provisions of the immigration laws other than this act, shall not be admitted to the United States if he is excluded by any provision of this act, Sec. 28 G (8 U. S. C. A., Sec. 224 G) defining the term 'immigration laws' as including 'all laws, *conventions, and treaties* of the United States relating to the immigration, exclusion or expulsion of aliens." And finally the decision is in direct conflict with the decisions of this court in the cases of

Wong Gar Wah v. Carr, 18 F. (2d) 250, certiorari denied, 275 U. S. 529;
Jeu Jo Wan v. Nagle, 9 F. (2d) 309.

Appellant seeks to liken his case to that of one who is admitted as a trader and thereafter abandons one line of business endeavor to engage in another. There is, of course, no similarity. A trader would not necessarily cease to be such by making a change in the particular line of business endeavor pursued by him. But appellant had abandoned the status under which he was admitted by remaining beyond the period fixed, without any effort to have that period extended, and at the time he assumed the occupation of Manager of Z. Inouye and Company his continued presence in the United States was without lawful right and had been unlawful for several months prior thereto.

Appellant argues that the time of his change of status is a false quantity. If that were so, an alien visitor might remain here for years in excess of the terms of his admission under the act and could then acquire a right to stay notwithstanding his unlawfully remaining, by engaging in trade. All the authorities are opposed to any such theory.

CONCLUSION.

It is conceded that petitioner was admitted for a temporary fixed period of six months as a visitor and that he took no steps to have that temporary admission extended. It is likewise conceded that neither at the time of his entry nor at the expiration of his temporary admission was he engaged in trade or of a status entitling him to enter or remain as a trader. Under express terms of the act and regulations, his admission was limited to six months and at the expiration of that time he was subject to deportation. His claim is that by virtue of an occupation which he assumed during a period when he was unlawfully remaining in the country, he acquired a right to stay. It is obvious that at that particular time he was unlawfully here and his position was no different from one whose original entry had been unlawful. Hence, under all the authorities, he could gain no right to stay by taking up such an occupation at that time. What his rights would have been had he been

a trader when he entered or had he changed his status while lawfully here as a visitor before his time expired, is not involved.

We submit that the decision of the court below was correct and should be affirmed.

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